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v.
ARC America Corporation, et al.

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Court: United States Court of Appeals
for the Ninth Circuit

See also:
88-1304

Counsel for appellant: Greene,Thomas

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Entry	Date	Note	Proceedings and Orders
1	May 9 1988	G	Statement as to jurisdiction filed.
3	May 26 1988		Order extending time to file response to jurisdictional statement until July 2, 1988.
4	Jun 6 1988		Brief amici curiae of Twenty States and the District of Columbia filed.
5	Jun 15 1988		Brief amicus curiae of United States filed.
6	Jul 1 1988		Motion of appellee ARC America Corporation to dismiss or affirm filed.
7	Jul 6 1988		DISTRIBUTED. September 26, 1988
8	Oct 3 1988		PROBABLE JURISDICTION NOTED. Justice Stevens and Justice O'Connor OUT.
			**********
10	Oct 26 1988		Order extending time to file brief of appellant on the merits until November 30, 1988.
11	Nov 16 1988		Record filed.
		*	Certified copy of C. A. proceedings and reporter's transcipt received. (Box)
12	Nov 30 1988		Brief amicus curiae of National Conference of State Legislatures, et al. filed.
13	Nov 30 1988		Brief amicus curiae of Consumers Union of U.S., Inc. filed.
14	Nov 30 1988		Brief amicus curiae of Thirty-Five States and the District of Columbia filed.
16	Nov 30 1988		Joint appendix filed.
17	Nov 30 1988		Brief of appellants California, et al. filed.
15	Dec 1 1988		Brief amicus curiae of United States filed.
18	Dec 15 1988	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
19	Dec 23 1988		Brief of appellees Allied Concrete, et al. filed.
20	Dec 29 1988		Brief amicus curiae of The Business Roundtable filed.
22	Dec 30 1988		Brief of appellee ARC America Corporation filed.
23	Dec 30 1988		Brief amicus curiae of Chamber of Commerce of the U.S. filed.
24	Dec 30 1988		Brief amicus curiae of National Association of Manufacturers filed.
27	Jan 6 1989		SET FOR ARGUMENT MONDAY, FEBRUARY 27, 1989. (4TH CASE.)
25	Jan 9 1989		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Stevens and Justice O'Connor OUT.
26	Jan 10 1989		CIRCULATED.
29	Jan 18 1989		Record filed.

No. 87-1862-AFX

Entry	Date	Note	Proceedings and Orders
		*	Certified copy of original record, 45 boxes, received. Received Jan., 18 and Jan. 19, 1989. (More to come).
28	Jan 30 1989	X	Reply brief of appellants California, Alabama, Arizona, and Minnesota filed.
30	Feb 23 1989		Record filed.
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31	Feb 27 1989		ARGUED.

JURISDICTIONAL

STATEMENT

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No.

Supreme Court, U.S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1987

STATE OF CALIFORNIA, *et al.*,
Appellants,
vs.
ARC AMERICA CORPORATION, *et al.*,
Appellees.

On Appeal From the United States Court of Appeals For the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether a state's exercise of its traditional police powers to protect victims of price-fixing may be preempted without reference to the expressed intent of Congress?

2. Whether a state's exercise of its traditional police powers to protect victims of price-fixing may be preempted based on hypothetical or speculative conflicts with federal law?

PARTIES TO THE PROCEEDING BELOW

A list of the parties to the proceeding below is found at Appendix M.

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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

STATE OF CALIFORNIA, *et al.*,
Appellants,
vs.
ARC AMERICA CORPORATION, *et al.*,
Appellees.

On Appeal From the United States Court of Appeals For the Ninth Circuit

JURISDICTIONAL STATEMENT

Appellants, the states of Alabama, Arizona, California, and Minnesota, appeal from a final judgment of the United States Court of Appeals for the Ninth Circuit. This appeal raises the fundamental question of the power of sovereign states to protect their economies and citizens from anti- competitive injury within the federal system. This appeal rises from the allocation of settlements amounting to $42.2 million for claims against participants in an alleged price-fixing conspiracy in the Portland cement industry. The antitrust laws of appellant states provide a remedy in damages for persons injured by such conspiracies whether or not such persons purchased directly from antitrust conspirators.

Federal law, with certain exceptions, limits damage recoveries in federal courts under federal law to persons who purchase directly from price-fixing conspirators. The Ninth Circuit held that states' statutes conflict with federal antitrust policies, and on that basis determined that states' claims based thereon are invalid under the supremacy clause. The effect of the Ninth Circuit ruling is to leave states, and ultimately taxpayers, without recom-

pense for indirect purchaser claims grounded on state law arising from public purchases of cement for roads, dams and other projects.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, which appears at Appendix A, is reported at 817 F.2d 1435 (9th Cir. 1987).

Pre-trial order 122, filed January 23, 1985, issued by the Honorable Manuel L. Real of the United States District Court for the Central District of California is not reported. This order is reproduced at Appendix B.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was entered on May 27, 1987. A petition for rehearing and suggestion for rehearing en banc was timely filed on June 10, 1987. This petition was denied on February 9, 1988.

A notice of this appeal was timely filed with the United States Court of Appeals for the Ninth Circuit on April 15, 1988. A copy of this notice is found in Appendix C. This appeal is being docketed in this Court within 90 days from the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(2). In the alternative, the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. § 4 (1982):

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust law may sue therefor in any district of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 1 of the Sherman Act, 15 U.S.C. § 1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

Alabama Code § 6-5-60:

> "Any person, . . . injured or damaged by an unlawful trust combine or monopoly, or its effect, direct or indirect, may, in each instance of such injury or damage, recover the sum of $500.00 and all actual damages from any person, firm or corporation creating, operating, aiding or abetting such trust, combine or monopoly . . ."

Arizona Rev. Stat. Ann. § 44-1408A:

> "The state, a political subdivision or any public agency threatened with injury or injured in its business or property by a violation of this article may bring an action for appropriate injunctive or other equitable relief, damages sustained and, as determined by the court, taxable costs and reasonable attorney's fees."

California Business and Professions Code Section 16750(a):

> "Any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by (California antitrust law), . . . may sue therefor . . . to recover three times the damages sustained by him or her, interest on his or her actual damages . . . , and shall be awarded a reasonable attorneys' fee together with the costs of the suit.
>
> "Such action may be brought by any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter, regardless of whether such injured person dealt directly or indirectly with the defendant."

Minn. Stat. § 325D.57 (1986):

> "Any person . . . injured directly or indirectly by a violation of (Minnesota antitrust law) shall recover three times

the actual damages sustained, together with costs and disbursements, including reasonable attorneys' fees. In any subsequent action arising from the same conduct, the court may take any steps necessary to avoid duplicative recovery against a defendant."

STATEMENT OF THE CASE

This appeal arises from settlements of class litigation against cement manufacturers for price fixing. This action had its origins in an antitrust investigation conducted by the Antitrust Division of the Arizona Attorney General's Office. Arizona investigators, with the aid of state subpoena authority Ariz. Rev. Stat. § 44-1406, uncovered evidence of a national conspiracy among cement manufacturers to fix and stabilize the price of their product in the face of declining demand and excess capacity. Plaintiffs' Joint Narrative Summary of Litigation and Statement of Central Facts and Legal Issues, Appendix D. Public agencies were of necessity a major target of the alleged conspiracy because approximately 33 percent of all Portland cement was used for public works projects while an additional 18 percent was used in the construction of public buildings[1] during the pendency of the alleged conspiracy.

On September 23, 1976, the State of Arizona, on behalf of itself and subordinate Arizona governmental entities, filed a civil complaint in the United States District Court for the District of Arizona, alleging violations of section 1 of the Sherman Act (15 U.S.C. § 1) and violations of Arizona antitrust law. App. E. The States of California, Minnesota and Alabama each filed a complaint on its own behalf and as a class representative seeking damages and injunctive relief for an alleged conspiracy in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. Appen-

[1] Estimated use of United States cement production in the early 1970's was: Public works projects, 33 percent; public buildings, 13 percent; residential construction, 20 percent; industrial and commercial, 17 percent; farms, 5 percent; and other, 4 percent. Lankard, *Cement and Concrete Technology for the Corrosion Engineer*, Materials Performance, Battelle, Columbus Laboratories, Columbus, Ohio, (August 1976.)

dices G, H and F. Each complaint alleged that defendant cement companies and co-conspirators had engaged in a nationwide price fixing conspiracy which affected commerce in each of the complaining states. The classes sought to be represented by each state included all governmental entities, except the federal government, within each state which purchased cement or cement-containing products or which caused to be built, structures which contained cement or cement-containing products.

In addition to alleging violations of federal law, each state asserted pendent state law claims alleging violations of state laws. Appendices E, F, G and H. These state law claims sought recovery for, *inter alia*, indirect purchases.

As is typical in antitrust practice, private plaintiffs filed "tag-along" complaints based on the state investigations. On September 12, 1977, the multi-district panel consolidated various *Cement* actions in the United States District Court for the District of Arizona. *In re Cement and Concrete Antitrust Litigation*, 437 F.Supp. 750 (J.P.M.D.L. 1977).

The State of California's case was transferred from the Central District of California to the District of Arizona by the Judicial Panel on Multi-district Litigation in 1977. The actions filed by the States of Minnesota and Alabama were transferred to Arizona in 1979 and 1980 respectively. These actions proceeded on a coordinated basis with the other actions comprising MDL No. 296.

On March 9, 1979, the Honorable D. J. Muecke of the United States District Court for the District of Arizona certified classes of cement purchasers pursuant to Rule 23 of the Federal Rules of Civil Procedure. *In re Cement and Concrete Antitrust Litigation*, 1979-1 Trade Cases (CCH) ¶ 62,502 (1979). Four classes were certified: (i) a National Cement Class constituted of all those who purchased cement during the relevant period other than defendants and members of other classes; (2) the California Governmental Class consisting of the State of California and its political subdivisions; (3) the similarly constituted Oregon Governmental Class; and (4) an Arizona Ready-Mix Class made up

of entities that purchased ready-mix concrete for delivery within Arizona.[2]

Between July 31, 1979, and October 23, 1981, seven class settlements were entered by all plaintiffs including the states and seven defendants. The monies from these settlements constitute the settlement fund at issue here.

In exchange for release of all plaintiffs' claims including the state law claims for indirect purchases, the fund now at issue was created. Prior to agreeing to the settlements, counsel for these states and counsel for the National Class exchanged letters confirming that all rights to make state law claims against the settlement funds were preserved. Appendix I.

The District Court approved these class settlements during the period February 5, 1981 through February 4, 1982. Subsequently, settling defendants had no further liability to plaintiffs.

Prior to final approval of the settlements, defendants sought only once to have state law claims dismissed. Before transfer of California's case in 1977, defendants moved in the Central District to dismiss California's state law claims for civil penalties. The Honorable Francis Whelan denied defendants' motion. Appendix . Thereafter, the state law claims remained unimpugned throughout the litigation until years after final settlement approval, when the entitlement to recompense from the settlement fund was questioned by members of the National Class.

HOW THE FEDERAL QUESTIONS WERE RAISED

On January 6, 1984, the district court decertified the National Cement Class. *In re Cement Concrete Antitrust Litigation*, 817 F.2d 1435, 1438 (9th Cir. 1987). The decertification order provided that absent class members retained their eligibility to participate in the settlements. (*Id.*)

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[2] In 1979, the Ready-Mix class settled its action and a partial judgment was entered on July 8, 1980. (*In re Cement and Concrete Antitrust Litigation*, 817 F.2d 1435, 1438 (9th Cir. 1987).)

During the period May 31, 1984 through January 11, 1985, plaintiffs and class members filed briefs concerning the distribution of the settlement fund. Among the issues contested was whether the states were entitled to compensation for their indirect purchases which had been asserted as pendent state law claims. A number of plaintiffs and class members challenged these state law claims.

Hearings were held on November 9, 1984 and January 14, 1985, concerning the various proposals for distribution of the settlement funds. On January 23, 1985, Judge Manuel L. Real entered Pre-Trial Order No. 122, which disallowed any recovery to the States based on their state law claims for indirect purchases. Appendix B. Judge Real's order provided in relevant part:

"(2) . . . (States' downstream purchaser statutes) are clear attempts to frustrate the purposes and objectives of Congress, as interpreted by the Supreme Court in *Illinois Brick*, and, accordingly are preempted by federal law".

Judgment was entered on Pre-Trial Order No. 122, pursuant to Rule 54(b) on February 4, 1985. Alabama, Arizona, California, Minnesota, and others timely appealed to the Ninth Circuit.

THE QUESTIONS ARE SUBSTANTIAL

This case presents the important unresolved question of the power of states to protect their economies and citizens from anti-competitive injuries passed on to them through a non-participant in an antitrust conspiracy. This Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), precludes a federal damage remedy for such injuries in most cases.

As a matter of antitrust economics and common sense, it is certain that intermediaries in a chain of distribution will seek to pass on anti-competitive overcharges to the maximum extent feasible. As this Court has itself noted, injuries to downstream purchasers of price-fixed goods are real. *Illinois Brick*, 431 U.S. at 746. Economics teaches that these injuries may be substantial.

Harris and Sullivan, *Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis.* 128 U.Pa.L. Rev. 269 (1979).

To protect themselves, their economies, and their citizens from such injuries, numerous states and the District of Columbia have relied on indirect purchaser provisions in their own antitrust laws.[3] In this case, the lower court determined that state indirect purchaser claims grounded on state law justify participation in settlements which were created, in part, by release of these claims.

The Ninth Circuit's preemption analysis is fundamentally flawed. It ignores the federalism jurisprudence of this Court and the expressed intent of Congress. As states demonstrate, the Congress has approved a District of Columbia statute which allows recovery by indirect purchasers. Such action belies a congressional purpose to preempt states' indirect purchaser laws.

The Ninth Circuit also relied on wholesale, and improper, speculation to find a conflict between states' statutes and federal law. In addition, this decision is in direct conflict with a decision of the Fifth Circuit and a decision of the highest courts of California. The effects of this decision, if allowed to stand, will be perverse, and contrary to the national interest.

This case raises fundamental questions of antitrust federalism which require resolution by this Court.

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[3] D.C. Code § 28-4509 (1981); Hawaii Rev. Stat. § 6 480-13 (1985); Ill. Ann. Stat. ch. 38, § 60-7 (Smith-Hurd 1987 Supp.); Md. Com. L.C. Ann. § 11-209(b)(2)(ii) (1983); Mich. Comp. Laws § 445.778 (1984); Miss. Code Ann. §§ 75-21-9, 75-41-15 (1972); N.M. Stat. Ann. § 57-1-3 (1987); R.I. Gen. Laws § 6-36-12 (1985) S.D. Cod. Laws § 37-1-33 (1986); Wis Stat. § 133.18 (1986).

I

THE LOWER COURT'S DECISION EFFECTIVELY PREEMPTS CRITICAL REMEDIAL PROVISIONS OF THE ANTITRUST LAWS OF FOUR STATES, AND CALLS INTO QUESTION SIMILAR PROVISIONS IN THE ANTITRUST LAWS OF NUMEROUS OTHER STATES AND THE DISTRICT OF COLUMBIA

After this Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), states have relied on state law to protect state and local agencies, and ultimately taxpayers, victimized by price fixers. This was necessary because public agencies, while they often paid the bill for anti-competitive overcharges, did not always purchase price-fixed products directly from antitrust conspirators.

California was typical of many states in amending its state antitrust law to make clear that downstream purchasers, if they could prove injury, had a right of recovery under state law. (Cal. Bus. & Prof. Code § 16750(a).) Much like Justice Cordozo's common sense decision in *MacPherson v. Buick*, 212 N.Y. 382, 111 N.E. 1050, (1916), the California Legislature keyed recovery to injury, not to technical questions of privity. Likewise, Minnesota amended its antitrust law to clarify its intent to encompass downstream purchaser recoveries subject to the limitation that "(i)n any subsequent action arising from the same conduct, the court may take any steps necessary to avoid duplicative recovery against a defendant." Minn. Stat. § 325D.57 (1986). Alabama's antitrust statute had a specific provision for injured "indirect" purchasers which antedated this Court's decision in *Illinois Brick*. Ala. Rev. Stats. 6-5-60. Arizona's antitrust authorities have interpreted that state's antitrust law as having incorporated federal rules of recovery extant at the time of its enactment. Ariz. Rev. Stat. Ann. § 44-1412. For Arizona, this is the rule providing for indirect purchaser recovery articulated in *In re Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), *cert. den.* 415 U.S. 919 (1974).

The laws of appellant states are representative of the indirect purchaser remedies in the antitrust laws of nine states and the District of Columbia. *See* n.3, *supra* at 8. In total, 74.9 million

Americans are sheltered by state antitrust laws called into question by the Ninth Circuit's decision in *Cement*.

II

THIS DECISION WILL HAVE PERVERSE EFFECTS ON VITAL STATE AND NATIONAL INTERESTS

States have a vital interest in their free economies, and protecting their citizens from demonstrable injuries arising from anti-competitive conduct.

As a matter of antitrust economics, it is certain that intermediaries in a chain of distribution will seek to pass on anti-competitive overcharges to the maximum extent feasible. Schaeffer, *Passing-on Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis*, 16 Wm. & Mary L.Rev. 883, 887-906 (1975). Among those products which are most likely to be price-fixed, overcharges will be paid by ultimate consumers. Harris & Sullivan, *Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U.Pa L.Rev. 269, 287-290 (1979). As this Court has noted, injuries to downstream purchasers of price-fixed goods are real. *Illinois Brick*, 431 U.S. at 746. Marginal cost analysis teaches that recoveries by direct purchasers under federal antitrust law will not be passed on to the downstream purchasers to help ameliorate the overcharges they have in fact sustained. Harris & Sullivan, *supra* at 298 n. 67, "Passing back is zero. . . . "

The effect of the lower court's decision is to leave states and their citizens without any remedy for demonstrable injury from acts condemned by state and federal law. This is patently unfair. Fairness aside, it will also lead to the misallocation of resources within states' economies, certainly a vital interest of both states and the nation.

Other vital interests are also compromised by this decision. State attorneys general, in partnership with federal antitrust authorities, have taken an increasingly important role in keeping markets free from anti-competitive conduct. Indeed, a former head of the Antitrust Division of the United States Department of

Justice has predicted that by 1996, antitrust law "will be primarily enforced by the states . . . ."[4] The *Cement* court decision will significantly hinder state antitrust enforcement efforts.

The public policy implications of this are dramatically illustrated in this case. Here, a national price-fixing conspiracy was uncovered and first challenged by state antitrust authorities. But for the time-consuming and expensive efforts of state antitrust prosecutors, there would have been no *Cement* case, nor any settlements. Yet, because of the Ninth Circuit's decision, states will recover none of the overcharges they paid for massive indirect purchases of cement. When state law enforcement officials are called upon in the future to decide where limited investigative resources will be committed, they will be hard-put to justify substantial expenditures to investigate many conspiracies because state taxpayers may not recover anything, despite their demonstrable injuries.

This threatens a diminished national effort to protect American markets from anti-competitive restraints. This is particularly true of efforts to ferret out the most dangerous, but typically the most difficult to detect, horizontal price-fixing conspiracies. This will lead to diminished economic efficiency in the American economy and hinder state efforts, *inter alia*, to assure the integrity of public purchasing in an era of tight budgets and increasing costs.

III

THE STATES' INDIRECT PURCHASER STATUTES DO NOT FRUSTRATE THE PURPOSES AND OBJECTIVES OF CONGRESS AND ARE THEREFORE NOT PREEMPTED

The lower court necessarily held that the state statutes were preempted by the supremacy clause of the Constitution which states that "[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; . . . anything in the constitution of laws of

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[4] Baxter, *What will be the State of Antitrust in the Year 1996?*, 1 Antitrust 32 (Winter, 1986).

any state to the contrary notwithstanding." U.S. Const. Art. VI. The court noted that federal law preempts state law in two situations:

> First, "[i]f Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (*Silkwood*). Second, [i]f Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is when it is impossible to comply with both state and federal law, . . . or *where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. Id.* (Citation omitted.) (Emphasis added.)

817 F.2d at 1444. The court then purported to review the purposes and objectives of Congress in enacting the Clayton Act. 817 F.2d at 1444-1445. Based on that review, the court invalidated the states' statutes.

"[A]s in any preemption analysis, 'the purpose of Congress is the ultimate touchstone.'" *Fort Halifax Packing Co. v. Coyne*, ___ U.S. ___, 107 S.Ct. 2211, 2216 (1987). Here the lower court determined that the indirect purchaser statutes stand as an obstacle to the accomplishment of the full purposes and objectives of Congress.

The lower court's review of the purposes and objectives of Congress was both flawed and incomplete. The states' indirect purchaser statutes have the same purpose as federal law, to promote the vigorous enforcement of the antitrust laws and to provide a remedy to victims of anti-competitive conduct. The purposes of the federal and state laws are in harmony. Rather than being an obstacle to the federal policy, the states' statutes mirror it.

This Court has determined that, in the interests of judicial economy and the avoidance of difficult ascertainment of damages, indirect purchasers may not sue under Section 4 of the Clayton Act, 15 U.S.C. § 15 (1982). *See Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982). However, such matters of

judicial *administration* without congressional support therefor are insufficient to justify preemption under the antitrust laws.[5]

The lower court elevated the limitations on the availability of a remedy set forth in *Illinois Brick* to the status of an ultimate purpose of Congress. As this Court stated in *Blue Shield of Virginia v. McCready*:

> Section 4 of the Clayton Act, 38 Stat. 731, provides a treble-damages remedy to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15 (emphasis added). As we noted in *Reiter v. Sonotone Corp.*, 42 U.S. 330, 337, 99 S.Ct. 2326, 2330, 60 L.Ed.2d 931 (1979), "[o]n its face, § 4 contains little in the way of restrictive language." And the lack of restrictive language reflects Congress' "expansive remedial purpose" in enacting § 4: Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations. . . . As we recognized, "[t]he statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practice by whomever they may be perpetrated.

457 U.S. at 472 (citations omitted). In *Illinois Brick* this Court determined that "the legislative purpose in creating a group of 'private attorneys general' to enforce the antitrust laws . . . is better served by holding direct purchasers to be injured in the full extent of the overcharge paid by them." 431 U.S. at 748.

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[5] Such an argument comes dangerously close to the idea that this Court can, on its own, preempt state laws under the Constitution. This is, of course, a concept without foundation in our system of federalism. (See Note, *State Indirect Purchaser Statutes: The Preemptive Power of Illinois Brick*, 62 Boston Univ. L.Rev. 1241, 1262 n. 138, 1268-1270 (1982).)

The legislatures of 13 states and the District of Columbia have determined that the enforcement of their antitrust laws is best served by allowing both direct and indirect purchasers to recover their injuries. In this way, the vigorous enforcement of the states laws by each state's attorney general will continue unfettered. There is no conflict between the purposes of the federal and state statutes. Indeed, the states' statutes ensure the private enforcement of the antitrust laws.

Supremacy clause analysis starts with "the assumption that the historic police powers of the states were not to be superceded by the federal act unless that was the clear and manifest purpose of Congress." *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, ___ U.S. ___, 56 U.S.L.W. 4307, 4308 (1988) quoting *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. at 707, 715 (1985), *quoting Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977), *quoting Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).[6] There has been no clear and manifest expression of congressional intent to preempt the states' statutes. To the contrary, Congress has demonstrated its approval of state indirect purchaser statutes.

A. Congress has Approved a District of Columbia Statute Which is Virtually Identical to the Statutes Found Preempted by the Ninth Circuit

The District of Columbia, created pursuant to Art I, § 8 (17) of the Constitution, bears a special relationship with Congress. Under the District of Columbia self-government and Governmental Reorganization Act, Congress carefully monitors and can veto statutes enacted by the district government. Pub. L. 93-198; D.C. Code Ann. § 1-233. In 1980, the District of Columbia enacted its first District antitrust law. D.C. Code Ann. §§ 28-4501 et seq. This statute contains an indirect purchaser provision virtually identical to those at issue here. D.C. Code Ann. § 28-4509.[7] In the Report of the Council of the District of Columbia reporting this legislation, it is clear that the rule of *Illinois Brick* was not to apply in actions under the Act. Report of the Council of the District of Columbia concerning Bill 3-107, the District of Columbia Antitrust Act of 1980 (Oct. 8, 1980); Appx. L. With respect to the relationship of the District law to federal antitrust proceedings, the report states:

> "However, it is a fact that in a suit in federal court direct purchasers may have been allowed treble damages in full while indirect purchasers in the same chain of distribution are without a remedy. In such cases section 28-4509 should be interpreted to allow local indirect purchasers suing under this act to recover at least the full measure of their compensatory damages. The defendant in the described federal case then is left to suffer fourfold damages if federal treble damage legislation is preemptively cumulative to any District antitrust damage remedies."

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[6] This rule has been expressly adopted as Executive branch policy in the President's recently issued Federalism Executive Order. Exec. Order 12,612, 52 Fed. Reg. 41685 (1987). The order provides, *inter alia*:

> "To the extent permitted by law, Executive departments and agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only when the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of State law, or when the exercise of State authority directly conflicts with the exercises of Federal authority under the Federal statute." Id. at § 4.

[7] D.C. Code Ann. § 28-4509 provides:

> (a) Any indirect purchaser in the chain of manufacture, production, or distribution of goods or services, upon proof of payment of all or any part of any overcharge for such goods or services, shall be deemed to be injured within the meaning of this chapter.
>
> (b) In actions where both direct and indirect purchasers are involved, a defendant shall be entitled to prove as a partial or complete defense to a claim for damages that the illegal overcharge has been passed on to others who are themselves entitled to recover so as to avoid duplication of recovery of damages.
>
> (c) In any case in which claims are asserted by both direct purchasers and indirect purchasers, the court may transfer and consolidate cases, apportion damages and delay disbursement of damages to avoid multiplicity of suits and duplication of recovery of damages, and to obtain substantial fairness.

This District legislation was transmitted to the Congress where it was referred to the appropriate committees of both houses as D.C. Act No. 3-300. Legislative history of Law 3-169, D.C. Code Ann. § 28-4501. The *Congressional Record* lists not a single resolution of disapproval having been introduced concerning this legislation, and the District antitrust statute became law without objection. *Id.*

This belies any suggestion that *Congress* views state indirect purchaser statutes with hostility. Indeed, this is a situation in which Congress has expressly approved state initiatives to protect their economies and citizens. Preemption, therefore, is improper.

B. Other Expressions of Congressional Intent Support the Validity of States Laws

While the Ninth Circuit was not aware of the District of Columbia statute,[8] other expressions of congressional intent support the validity of states' laws. Section 4 of the Clayton Act extends a remedy in damages to "*any person* who shall be injured in his person or property by anything forbidden in the antitrust laws." 15 U.S.C. 15(a) (emphasis added). The congressional reports and debates accompanying enactment of federal *parens patriae* legislation, codified in relevant part at 15 U.S.C. § 15c, support, rather than evince hostility, to indirect purchaser actions brought by state attorneys general. 122 Cong. Rec. H 10,295 (daily ed. Sept. 16, 1976) (remarks of Rep. Rodino ("recoveries are authorized by the compromise bill whether or not the consumers purchased directly . . . or indirectly"); H.R. Rep. No. 94-499, 94th Cong., 1st Sess. 7 (1975) *reprinted in* [1976] U.S. Code Cong. & Ad. News 2572 (Congress concerned with situation in which "wholesalers and retailers have passed on all or most of the cost of violation to consumer"); see also S.Rep. No. 94-803, 94th Cong., 2d Sess. 42 (1976).

Nothing in the congressional history of the federal antitrust laws indicates hostility to the kinds of statutes held ousted by the

[8] States only recently learned of congressional approval of this statute. As a consequence, this statute and its implications were not brought to the attention of the lower court.

Ninth Circuit. "And while the views of a subsequent Congress cannot override the unmistakable intent of the enacting one . . . such views are entitled to significant weight." *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980). Certainly there is no basis for concluding that Congress has evinced the necessary "clear and manifest" intent to preempt states' laws mandated by the federalism decisions of this Court. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230.

IV

IGNORING THE CASE BEFORE IT, THE NINTH CIRCUIT IMPROPERLY GROUNDED ITS PREEMPTION OF STATES LAWS ON HYPOTHETICAL OR SPECULATIVE CONFLICTS WITH IMPUTED FEDERAL POLICIES

"It is not . . . a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of (state) sovereignty." The Federalist No. 32, p. 243 (B. Wright ed. 1961) *quoted in Goldstein v. California*, 412 U.S. 546, 554-555 (1973). This Court has consistently reminded lower courts that hypothetical or speculative conflicts with federal law will not and indeed cannot support preemption under the Supremacy clause. *Rice v. Norman Williams Co.*, 438 U.S. 654, 659 (1982); *see also DeCanas v. Bica*, 424 U.S. 351, (1976); *Goldstein v. California*, 412 U.S. 546 (1973) Despite this clear rule, the lower court engaged in wholesale speculation about potential conflicts between states' laws and federal antitrust law.

Relying on this Court's decision in *Illinois Brick* as a proxy for congressional intent, the lower court imputed three purposes to Congress which assertedly conflicted with states' laws. These imputed policies are: (1) a congressional purpose to avoid complexity in federal proceedings, (2) a congressional purpose to limit recoveries from price-fixers to the amount of the anti-competitive overcharge arising from their conspiracy trebled; and (3) a congressional purpose to insure the vigorous prosecution of the antitrust laws. *Cement*, 817 F.2d at 1444-1446.

The lower court did not analyze the facts of the case before it to determine whether a conflict existed with these imputed purposes of Congress. Instead, the court justified its determination with hypotheticals.

States' indirect purchaser claims do not introduce additional complexity into this proceeding. States' representatives told the trial court that no known indirect claim overlapped a direct purchaser claim, that is, there was no need to assess the extent to which a direct purchaser had passed on the anti-competitive overcharge to an indirect purchaser. As Minnesota's counsel stated to Judge Real: "And wherever a claimant, a contractor submitted a claim who also did work on state projects, whether or not that person may have submitted a claim based on the work for the State of Minnesota or not, we moved that particular claim from our claim form. So we have only submitted claims for projects where we know that the contractor who did the installation has not submitted a claim at all." Appendix K, p. A-164.

California's counsel made a similar representation to the court: "and I don't see that there has been any showing here by anybody upon which your Honor can make a determination that there is any conflicting claim or there is any need to pass-on. Nobody here has made any argument and made any factual presentation—" Appendix K, p. A-163.

As a consequence, no pass-on analysis was required of the trial court. At best, a simple *pro rata* allocation of the settlements was required. This is a far lighter burden than that imposed by the cost-plus and controlled subsidiary exceptions contained in this court's decision in *Hanover Shoe* and *Illinois Brick*.[9] *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 382 U.S. 481, 494 (1968), cost-plus; *Illinois Brick*, 431 U.S. at 736, n. 16, controlled subsidiary.

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[9] With respect to this point generally, state indirect purchaser claims can be considered by a federal trial court only if that court exercises its discretionary authority to consider pendent state law claims. *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966).

With respect to multiple liability, the most basic fact in this case is that defendants' liability was fixed by the settlements; they would not pay more if downstream victims recovered a fair share of the settlement. So-called "multiple liability" issues were not at issue.[10] Notwithstanding this fact, the Ninth Circuit opined that "the state indirect purchaser claims asserted here conflict most directly with federal policy because they create the risk of multiple liability for defendants." (*Cement*, 817 F.2d at 1446. The overreaching in the lower court's analysis is perhaps best illustrated by review of the court's decision concerning the Minnesota statute at issue, Minn. Stat. § 325D.57 (1986). / F.2d at 1446-1447. Section 325D.57 expressly authorizes the court to "take any steps necessary to avoid duplicative recovery against a defendant." Despite the fact that the Minnesota legislature authorized the court to take *any steps necessary* to avoid multiple liability and the absence of any threatened possibility of multiple liability

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[10] Even had defendant's liability not been fixed by the settlements, the existence of a federal penalty does not support preemption of state remedial statutes designed to protect vital state interests and its citizens from injury. *Silkwood v. Kerr McGee Corp.*, 464 U.S. 238 (1984). Only affirmative congressional support for ouster of state remedial statutes, absent here, will support their preemption. *Id., United Construction Workers v. Laburnam Corp.*, 347 U.S. 656 (1954).

> It is axiomatic that:
> " 'The same act might, as to its character and tendencies, and the consequences it involved, constitute an offense against both the state and federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each.' " *California v. Zook*, 336 U.S. 725, 731 (1949), quoting *United States v. Marigold*, 9 How. 560, 569.

Indeed, state and federal authorities can impose criminal penalties for acts as they affect their respective interests. *Bartkus v. Illinois*, 359 U.S. 187 121 (1959); *Abbate v. United States*, 359 U.S. (1959). The same is true with respect to civil remedies. *New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1086, district court has jurisdiction to award treble damages pursuant to section 4 of the Clayton Act (15 U.S.C. § 15), and civil penalties under New York's antitrust law, the Donnelly Act, N.Y. Gen. Bus. Law 342-a. *A fortiori*, payments arising from civil actions to enforce state antitrust law through recoveries directly tied to the extent of injury to states and their citizens are proper.

in the case before it, the lower court held that this statute creates a serious risk of multiple liability.

As to vigorous prosecution, this case was brought and settlements reached only because of the investigative efforts of state prosecutors. Other plaintiffs were the beneficiaries of the efforts of those representing government entities with substantial claims for indirect purchasers of cement. In addition, as the colloquies with states' representatives make clear, there was *no* evidence that any claim of a direct purchaser plaintiff was threatened by a state claim.

The Cement court also suggests that "(t)o the extent that indirect purchaser claims have been brought or threatened, a defendant will reduce any offer to compromise with direct purchasers. *Cement*, 817 F.2d at 1446. Not only is this sheer speculation, it is contradicted by the facts of this case. This Court has made clear the extent to which direct purchasers can recover under federal law. *Illinois Brick v. Illinois, supra*, 431 U.S. 720. Rational plaintiffs in a price-fixing action would be foolish to discount their federal claims for direct purchases because of the possibility of distinct claims grounded on state law.

The court further speculates that "if antitrust treble damages judgments exhausted a defendants' net assets, then the claims of direct purchasers would have to share the defendant's estate in bankruptcy with the claims of indirect purchasers." (*Cement*, 817 F.2d at 1446.) There was no bankruptcy in this case. Indeed, appellants are unaware of any case in which antitrust liability has resulted in a bankruptcy.

It is clear that the Ninth Circuit decision is infected with speculation about hypothetical, and indeed farfetched, conflicts between imputed federal policies and states laws. This is wholly at odds with the Supremacy clause jurisprudence of this Court. *Rice v. Norman Williams Co., supra*; *DeCanas v. Bica, supra*; *Goldstein v. California, supra.*

V

THE LOWER COURT'S DECISION CONFLICTS WITH A DECISION OF THE FIFTH CIRCUIT AND A DECISION OF THE COURTS OF CALIFORNIA

The *Cement* decision of the Ninth Circuit is in direct conflict with decisions of the Fifth Circuit and the California appellate courts. *In re Chicken Antitrust Litigation*, 669 F.2d 228 (5th Cir. 1982); *Crown Oil Co. v. Superior Court*, 177 Cal.App.3d 604 164 (1986) *rev. den.*, 177 Cal.App.3d *614* (Cal.Sup.Ct. 1986), *appeal dismissed for want of jurisdiction sub. nom., Crown Oil Corp. v. Lapidus Popcorn, Inc.*, ____ U.S. ____, 107 S.Ct. 265 (1986).

In *Chicken*, the Fifth Circuit was presented with a virtually identical challenge to recoveries by indirect purchasers based on state law. The *Chicken* court then concluded that indirect purchasers "could resort to state law remedies to vindicate their claims, citing to, *inter alia*, the indirect purchaser provision of Alabama and California antitrust law. *Chicken*, 669 F.2d at 238, 239, n. 18. The court further noted that potential state claims for injunctive relief, and possible state criminal prosecutions further justified governmental entities share in the settlement for their indirect purchases. (Id., at 238, 240, n. 20.)

In *Crown Oil*, defendants in a price-fixing action involving coconut oil challenged the validity of claims for downstream purchases of oil on the grounds of, *inter alia*, preemption by *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). In an analysis wholly consistent with the federalism jurisprudence of this Court, the *Crown Oil* court determined initially that there was no conflict between the acts forbidden by federal and state law; both state and federal law prohibited price fixing. *Crown Oil*, 177 Cal.App.3d at 611. Citing this Court's decisions in *California v. Zook*, 366 U.S. 725, 731 (1949) and *Silkwood v. Kerr McGee Corp.*, 464 U.S. 238 (1984), the *Crown Oil* court found that states could properly impose additional penalties insofar as the same illegal act affected state citizens. *Crown Oil*, 177 Cal.App.3d, at 611. The court concluded that the "fact that the injured indirect purchasers may recover under state law does not obstruct the federal scheme which only allows recovery by direct

purchasers." *Id.*, at 612. This conclusion is consistent with the limited scope of this Court's analysis of federal policies in *Illinois Brick*. Note, *Indirect Purchaser Suits Under State Laws: A Return Around the Illinois Brick Wall*, 34 Stan. L.Rev. 203, 211-212 (1981).

The searching scrutiny of congressional purposes by the *Crown Oil* court should have been replicated by the *Cement* court. However, it was not, with the result that the Ninth Circuit decision conflicts with decisions of both California and the Fifth Circuit. These conflicts on a crucial issue of antitrust federalism should be resolved by this Court.

VI

IF THIS COURT DETERMINES THAT THIS IS NOT PROPERLY AN APPEAL, STATES RESPECTFULLY REQUEST THAT THIS COURT TREAT THIS JURISDICTIONAL STATEMENT AS A PETITION FOR WRIT OF CERTIORARI AND GRANT THE PETITION

The lower court did not expressly state that the states' statutes were preempted, but rather concluded that the states' "claims" were preempted. 817 F.2d at 1447. Even a cursory review of the court's opinion demonstrates that the Ninth Circuit did, in fact, find that the states' *statutes* were repugnant to the Constitution.

The lower court began its analysis of the states' indirect purchaser statutes in the following way:

> The district court disallowed claims arising from indirect purchases of cement-purchases of cement or products containing cement from a middle level distributor rather than directly from a manufacturer. *The court concluded that state statutes purporting to authorize claims by indirect purchasers are preempted by federal law because "[s]uch statutes are clear attempts to frustrate the purposes and objectives of Congress, as interpreted by the Supreme Court in Illinois Brick* Co. v. Illinois, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977)." *The question whether federal law preempts state law is an issue of law which we review de novo.*

817 F.2d at 1444 (emphasis added). The court continued:

> No one argues that Congress intended federal law to occupy entirely the field of antitrust law, nor do we need to reach that issue. *We therefore decide the question before us by applying the second, more limited, test for preemption, and examining the relationship of the state indirect purchaser statutes to the purposes and objectives of Congress with respect to the federal antitrust laws.*

Id. Thus, although the court concluded its opinion by stating that the states' *claims* were preempted, it is clear that the Ninth Circuit did invalidate the states' statutes. Therefore, this Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1254(b) (1982).

This case is distinguishable from *Silkwood v. Kerr-McGee Corp.* 464 U.S. 238 (1984). There this Court determined that the Tenth Circuit had not invalidated a state law because the lower court "did not purport to rule on the constitutionality of the [state] statute." 464 U.S. at 247. As a result, the Supreme Court was deprived of jurisdiction under 28 U.S.C. § 1254(b) *Id.*

Here, the lower court did rule on the constitutionality of the state's statutes. Unlike *Silkwood*, in this case the parties did contest and defend the constitutionality of the statutes in their briefs and in oral argument to the Ninth Circuit *Cf. Silkwood*, 464 U.S. at 247.

The fact that the state's statutes were invalidated by the Ninth Circuit is also shown by the fact that the lower court did not ground its preemption analysis in the facts of this case. As is more fully discussed above, the lower court ignored the facts of this case and held the state statutes invalid based on hypothetical fact patterns. If the Ninth Circuit opinion was truly limited to the claim before it, then it was incumbent upon the court to analyze those claims. It did not, relying instead upon speculation. Review of the Ninth Circuit's preemption discussion in total demonstrates that the state statutes have indeed been invalidated. An appeal under section 1254(b) is proper.

Should the Court determine that this appeal does not lie within its section 1254(b) appeal jurisdiction, the states respectfully request that the Court treat the jurisdictional statement as a petition for a writ of certiorari and grant the petition. In the alternative, the errors of the lower court can be rectified by summary reversal of the judgment below.

CONCLUSION

For the foregoing reasons, this court should note probable jurisdiction of this appeal or, in the alternative, regard this jurisdictional statement as a petition for certiorari and grant the petition.

DATED: May 9, 1988

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APPENDIX A

In Re: CEMENT AND CONCRETE ANTITRUST LITIGATION.

STATE OF ARIZONA,
Plaintiff-Appellant,

v.

CITY OF AUSTIN, et al.,
Plaintiffs-Appellees,
and
PORTLAND CEMENT ASSOCIATION, et al.,
Defendants,

v.

ARC CORPORATION, et al., Class
Members-Appellees.

STATE OF CALIFORNIA,
Plaintiff-Appellant,

v.

PORTLAND CEMENT ASSOCIATION, et al.,
Defendants-Appellees.

STATE OF MINNESOTA,
Plaintiff-Appellant,

v.

PORTLAND CEMENT ASSOCIATION, et al.,
Defendants-Appellees.

ARIZONA SLUMP BLOCK, INC.,
Plaintiff-Appellant,

v.

PORTLAND CEMENT ASSOCIATION,
CITY OF AUSTIN, et al.,
Defendants-Appellees.

SMITH & GREEN CORP.,
Plaintiff-Appellant,

v.

PORTLAND CEMENT ASSOCIATION,
CITY OF AUSTIN, et al.,
Defendants-Appellees.

STATE OF ALABAMA,
Plaintiff-Appellant,

v.

PORTLAND CEMENT ASSOCIATION, et al.,
Defendants-Appellees.

Nos. 84-2865, 85-1670 and 85-1722 to 85-1724.

United States Court of Appeals,
Ninth Circuit.

Argued Sept. 30, 1986.

Submitted Feb. 4, 1987.

Decided May 27, 1987.

Appeal from the United States District Court for the District of Arizona.

Before WALLACE, HUG and BRUNETTI, Circuit Judges.

WALLACE, Circuit Judge:

In this consolidated action, the parties appeal from the district court's judgment and orders certified for appeal which encompass a plan for distributing a fund created by the settlement of a multidistrict class action alleging a nationwide conspiracy to fix the price of cement. The appellants contend that the "offset" provision in the plan is inequitable, that certain parties should have been ex-

cluded from participation, and that other potential claimants should have been allowed to share in the fund. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I

Beginning in 1976, 35 actions were filed in 12 district courts against a number of cement manufacturers and their trade association alleging, among other things, a nationwide conspiracy to fix prices in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. Six of these actions also alleged another conspiracy among certain sellers of ready-mix concrete in Arizona (the Ready-mix Companies). Several of the lawsuits alleged other antitrust violations, including violations of state laws. On September 12, 1977, the Judicial Panel on Multidistrict Litigation transferred all pending actions to the District of Arizona for coordinated pretrial proceedings. *In re Cement and Concrete Antitrust Litigation,* 437 F.Supp. 750 (J.P.M.D.L. 1977).

On March 9, 1979, the district court granted a motion to certify the actions as class actions and establish four classes. The first and broadest class was the National Cement Class, made up of all those who purchased cement during the relevant time period other than the defendants and the members of the governmental classes. The next two classes, the California Governmental Class and the Oregon Governmental Class, consist of the respective states and their political subdivisions that purchased cement. The fourth class, the Arizona Ready-mix Class, consists of those entities that purchased ready-mix concrete for delivery within the State of Arizona. In the fall of 1979, the defendants in this fourth class action (the Ready-mix Companies) settled with this class and a

partial judgment was entered on July 8, 1980, pursuant to Fed.R.Civ.P. 54(b).

Between July 1979 and October 1981, the first three classes entered into a series of settlement agreements with seven of the major defendants. The settlements totaled approximately $32,000,000 in cash plus 135,000 shares of stock in one of the defendant companies. The settlement agreements left distribution of the settlement fund for later resolution, subject to the approval of the court. On January 6, 1984, the district court decertified the National Cement Class. The decertification order provided, however, that absent class members retained their eligibility to participate in the settlement fund. After decertification, the remaining defendants reached separate settlements with the California and Oregon Governmental Classes and with most of the remaining individual plaintiffs.

On January 21, 1985, the district court approved a plan for distributing the settlement fund. Under this plan, the fund would be distributed to the class members in proportion to the amount of their cement purchases both from manufacturers who settled with the class (settling defendants) and from manufacturers who did not settle with the class (nonsettling defendants). Any claimant, however, whose claim was based on purchase from nonsettling defendants would have to offset against his share of the fund any amount he had already received in an individual settlement with a nonsettling defendant. Furthermore, if a claimant chose to continue litigating claims against the nonsettling defendants, the claimant's share of the settlement fund would be placed in escrow pending the outcome of that litigation. Any amount received by that claimant from continued litigation with the nonsettling defendant would then be offset against the claimant's share when released from escrow. Alternatively, a claimant could choose to waive any claims against nonsettling defendants and immediately receive a full share of the fund.

On appeal, the parties raise five objections to the district court's allocation of the settlement fund. First, they argue that the court should have adopted a proposal for assigning "weights" to claims as a substitute for the plan's offset provision. Second, Arizona contends that the court should have excluded the Ready-mix Companies from sharing in the fund. Finally, some argue that the district court erred in the refusal to allow payments out of the fund for claims based on: (1) an alleged concerted refusal to deal, (2) state civil penalty statutes, and (3) state indirect purchaser statutes. We consider each of these five objections in turn.

II

Several of the parties in this appeal object to the offset provision in the district court's plan and to the procedures followed by the district court in its adoption. Rule 23(e) declares that a "class action shall not be . . . compromised without the approval of the court." Fed.R.Civ.P. 23(e). When evaluating a proposed class action settlement, a district court must determine whether it is "fundamentally fair, adequate and reasonable." *Officers for Justice v. Civil Service Commission*, 688 F.2d 615, 625 (9th Cir.1982) (*Officers for Justice*), *cert. denied*, 459 U.S. 1217, 103 S.Ct. 1219, 75 L.Ed.2d 456 (1983). We review the district court's determination for an abuse of discretion. *In re Equity Funding Corporation of America Securities Litigation*, 609 F.2d 1353, 1362 (9th Cir.1979) (*Equity Funding*).

A.

The district court required class members who purchased cement from nonsettling defendants to offset their share of the settlement fund with any moneys they have received or will receive in litigation against the nonsettling defendants. Without this requirement, the plan was perceived as being inequitable to class members who purchased cement only from the settling defendants. Some time before the parties agreed to settle, the defendants had entered into a judgment-sharing agreement. Because of this agreement, the settling defendants could terminate their liability in the case only by having the plaintiffs agree not to sue the nonsettling defendants based upon their joint liability for the acts of the settling defendants. A successful settlement was possible therefore only because the plaintiffs covenanted not to sue the nonsettling defendants based upon their joint liability for the plaintiffs' purchases of price-fixed cement from the settling defendants.

Nevertheless, even with this covenant, the plaintiffs retained the right to continue litigation against nonsettling defendants if the lawsuits were based on purchases from those defendants. Therefore, a portion of the class — those who purchased only from the settling defendants — had to release all claims against the nonsettling defendants, while the remainder of the class did not. This left open the possibility that class members with claims against nonsettling defendants could secure double recovery: collect from the settlement fund for purchases made from settling defendants, and also collect against the nonsettling defendants under another settlement or a judgment. The district court adopted the offset provision to put plaintiffs who purchased cement from nonsettling defendants in the same position as plaintiffs

who had to waive their joint-liability claims against those nonsettling defendants. On appeal, some parties argue that the court instead should have adopted one of two other proposed solutions.

One proposal would have allowed only class members who purchased cement from settling defendants to share in the fund. The district court properly rejected this solution. Antitrust defendants are jointly and severally liable for the acts of their coconspirators. *See, e.g., In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1257 (7th Cir.1980). Therefore, the settling defendants were liable to all class members, not to just those members who purchased cement from them personally. Accordingly, class members who purchased cement from nonsettling defendants had valid claims, and thus were entitled to share in the fund.

The second proposal would have the court "weight" claims. Under this proposal, a weight of 1.0 would be assigned to claims based upon purchases from the settling defendants and a lower weight, possibly as low as 0.0, would be assigned to claims based upon purchases from nonsettling defendants. The proposal did not offer any criteria for such a weighting, nor did it suggest examples of what might be appropriate weights for the claims of any of the class members.

Although the district court rejected the weighting proposal, the offset provision it adopted in effect applies an equitable weighting to claims. Class members who purchased cement from nonsettling defendants will participate fully in the settlement fund except to the extent they have benefited from their separate lawsuits against the nonsettling defendants. That is, claims to the fund based upon purchases from nonsettling defendants are effectively given a lower weight. Moreover, this weight is not

based upon an artificial estimate. Insted, the weight of a claim to the fund is discounted by the precise value that a class member receives from its claims against the nonsettling defendants. Those who do not receive any value from these claims receive a full share of the fund. Those who do receive a value from these claims, through either a settlement with or a judgment against these defendants, receive a proportionately smaller share of the fund. The court's plan thus "weights" the claims to the fund in an equitable manner.

On at least two other occasions we have affirmed a district court's approval of a class action settlement that included an offset provision. In *Equity Funding*, 603 F.2d 1353, the district court approved a plan that required claimants to offset their share of the fund against any moneys they received in a related bankruptcy proceeding. We affirmed the district court, stating that the court's approval of the offset provision "was a component of its duty to insure the equitable distribution of the settlement proceeds." *Id.* at 1365. In *Officers for Justice,* 688 F.2d 615, the district court approved a class action settlement in an employment discrimination lawsuit that contained a "mitigation clause." Under the clause, a claimant's share of the back pay settlement was reduced if he had already received some compensation by occupying certain higher paying positions. *Id.* at 629. We found the mitigation clause to be "an entirely reasonable provision." *Id.* at 630.

All participants in the Cement settlement wanted more. We must recognize, however, that "[a] just result is often no more than an arbitrary point between competing notions of reasonableness." *In re Corrugated Container Antitrust Litigation,* 659 F.2d 1322, 1325 (5th Cir. Unit A Oct. 1981), *cert. denied,* 456 U.S. 998, 100 S.Ct. 2283, 73 L.Ed.2d 1294 (1982). We hold that, in adopting the offset

provision, the district judge forged an equitable solution and did not abuse his discretion.

B.

The State of Arizona raises three procedural objections to the offset provision. Arizona first argues that class members did not have adequate notice and an opportunity to object to the offset provision. Second, Arizona argues that the offset provision constituted an impermissible unilateral modification of the proposed settlement. Finally, Arizona contends that the waiver provisions of the plan create an impermissible "spurious" class action.

Rule 23(e) of the Federal Rules of Civil Procedure states that notice of a compromise in a class action "shall be given to all members of the class in such manner as the court directs." Although the rule gives a court broad discretion, both the form and content of the notice must satisfy constitutional due process requirements. *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 172-77, 94 S.Ct. 2140, 2150-52, 40 L.Ed.2d 732 (1974). The due process clause requires that notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). This standard does not mean that the notice must recite the language of every provision of a proposed settlement agreement. Notice is satisfactory if it "generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *Mendoza v. United States,* 623 F.2d 1338, 1352 (9th Cir.1980) (*Mendoza*), *cert. denied,* 450 U.S. 912, 101 S.Ct. 1351, 67

L.Ed.2d 336 (1981). Whether notice satisfies due process is a question of law which we review de novo.

On July 29, 1984, the class members in this case received a notice informing them that the parties had entered into the proposed settlement agreement creating the settlement fund. The question of how to distribute the funds was held in abeyance pending consideration by the court of "the views of all interested parties." On November 9, 1984, the district judge announced for the first time his intention to require class members to offset their claims against the fund with any moneys received from nonsettling defendants. Thus, the parties were never directly given notice of the offset provision until after it had been imposed.

The July 29 notice, however, warned the parties that the district court would be determining "whether the plan of distribution should give preference to claims for purchases from the settled defendants . . . by assigning a weighting factor in favor of such purchases as compared to purchases from all other cement manufacturers." Class members were thus on notice that to the extent a claim was based on purchases from nonsettling defendants, the court might reduce a claimant's share of the proceeds. The distribution plan ultimately adopted by the district court is within the scope of this notice. Under the plan, a claim based on purchases from nonsettling defendants may be reduced through an offset for any recoveries from those defendants. As discussed earlier, the district court has in effect assigned a lower weight to claims based on purchases from nonsettling defendants. The notice sufficiently alerted those class members adverse to such a scheme "to investigate and to come forward and be heard." *Mendoza,* 623 F.2d at 1352; *see In re Corrugated Container Antitrust Litigation,* 643 F.2d 195, 223-24 (5th

Cir.1981) (holding that notice of a settlement agreement that failed to provide an estimated range of per unit recovery was nonetheless satisfactory), *cert. denied,* 456 U.S. 998, 102 S.Ct. 2283, 73 L.Ed.2d 1294 (1982); *Equity Funding,* 603 F.2d at 1361-62 (holding that notice need not give a precise valuation figure if the notice informs the class that the judge will be deciding the question at the hearing).

Arizona's second objection is based on the proposition that a court may not unilaterally modify a settlement agreement but may only approve or reject the agreement as a whole. *See Officers for Justice,* 688 F.2d at 630 (dicta); *Pettway v. American Cast Iron Pipe Co.,* 576 F.2d 1157, 1172 (5th Cir.1978), *cert. denied,* 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979). Arizona suggests that the district court has done exactly this because the precise terms of the plan of distribution were not contained in any plan proposed by the parties but instead were provided by the court.

We need not decide whether a court may under some circumstances unilaterally modify a class action settlement because we conclude that here the district court did not make such a unilateral modification. In 1981, the district court approved, without modification, the seven settlement agreements that created the settlement fund. Each of these agreements provided that "[t]he allocation and distribution of the Settlement Fund shall be in accordance with the provisions of any agreements or plans approved by the Court." When the court approved these settlement agreements it explicitly retained jurisdiction "for the purpose of supervising and directing the administration of the settlements and distribution of the Settlement Funds."

One could construe these provisions to mean that the district court merely retained the authority to approve or disapprove a plan of distribution. Such a construction, however, accords neither with the course of proceedings nor with the understanding of the parties. The parties did not reach an agreement on a unified distribution plan and then submit it to the district court for approval. Instead, the parties submitted several issues as to distribution of the funds to the court for its resolution. Moreover, correspondence among the parties indicates that they understood that "all plaintiffs are free to engage in any 'donnybrook' that may be appropriate to divide up the 'spoils' " and that failure to achieve agreement among plaintiffs "will necessitate resolution by the court." We conclude that the parties intended to be bound by the district court's resolution of these distribution issues in the same way that parties to a contract might agree to be bound by the findings of an appraiser or an arbitrator. In short, the parties consented to the district court's reasonable resolution of conflicts that might arise when distributing the settlement fund. Therefore, the court did not "unilaterally" modify the settlement agreement. *Cf. Equity Funding,* 603 F.2d at 1365-66 (affirming class action settlement that gave the district court authority to place a value on certain securities and to determine whether to offset recoveries as part of the distribution plan); *Curtiss-Wright Corp. v. Helfand,* 687 F.2d 171, 173 (7th Cir.1982) (holding that a district court may unilaterally reduce a class member's share of a settlement fund if the court reserved decision on the issue before approving the settlement).

Arizona's final contention is that the waiver provision of the plan in effect requires those who purchased cement from nonsettling defendants to "opt-in" to the settlement class after the settlement was already approved. Such an

opt-in provision, Arizona argues, violates the intent and purpose of rule 23 by creating what is known as a "spurious class action." This argument mischaracterizes the nature of the election that these class members faced. The class members who purchased cement from the nonsettling defendants were, by definition, already members of the class when the settlement was approved. As members, they are entitled to share in the settlement fund. The only election they were required to make was not whether to opt-in, but instead whether to waive their rights against the nonsettling defendants. The waiver provision does not create a "spurious class action."

III

Arizona argues that the Ready-mix Companies should not be allowed to share in the settlement fund because they were not part of the National Cement Class. The district court erred, Arizona contends, by ruling in the final order distributing the funds that the Ready-mix Companies were included in the class when the notice of settlement was approved on October 20, 1980.

No one doubts that the Ready-mix Companies were "purchasers of cement" under the definition of the National Cement Class. Arizona argues, however, that the Ready-mix Companies fell within a provision in the class definition excluding "defendants" from the plaintiff class. Arizona contends that the Ready-mix Companies were defendants in the cement conspiracy because they were coconspirators with the cement manufacturers. Arizona also points out that, in any case, the Ready-mix Companies were certainly defendants in the separate count that alleged an Arizona-wide conspiracy among the Ready-mix Companies to fix the price of ready-mix concrete.

We need not address this issue directly. In 1981, the parties stipulated that the Ready-mix Companies were part of the National Cement Class. The court approved this stipulation and entered an order on April 14, 1981, to reflect the parties' agreement on this issue. None of the parties moved the district court for relief from the stipulation. Indeed, even on appeal Arizona does not argue that the stipulation was not binding or valid. Because the validity of the stipulation was questioned neither in the district court nor on appeal, the parties are bound by it. The stipulation specifically encompasses the question of the Ready-mix Companies' participation; therefore, we conclude that they are part of the National Cement Class and entitled to participate in the settlement.

Arizona makes a final argument with respect to one of the Ready-mix Companies, New Pueblo Constructors, Inc. (New Pueblo). Arizona contends that New Pueblo must be excluded from participation in the settlement fund because New Pueblo stipulated to the dismissal of the separate action it brought against the defendants. This argument is plainly without merit, however, because that stipulation expressly stated that it did not preclude New Pueblo from asserting any rights it may have to the settlement fund.

IV

Appellants Smith & Green Corp. and Arizona Slump Block, Inc. (collectively Smith & Green) argue that the district court should have allowed them to share in the settlement fund based on their claims alleging that the defendants conspired to refuse to deal with them in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. In an order filed November 23, 1984, the district court ruled that Smith & Green "are not members of the plaintiff

class of direct purchasers" and therefore could not share in the settlement fund. The court later clarified this ruling in an order filed January 28, 1985, by stating that Smith & Green could make claims based upon direct purchases of cement but that "[c]laims based upon a refusal to deal will not be allowed."

We must determine initially the scope of our review when examining a district court's interpretation of a class definition. If this were a district court's initial order either denying or certifying a class, we would review for an abuse of discretion. *See Moore v. Hughes Helicopters, Inc.,* 708 F.2d 475, 479 (9th Cir.1983). It may be that this same standard of review should also be used when determining whether a district court properly modified the scope of a class by altering the class definition. When, however, a court does not modify a class description, but instead interprets an existing class definition, the court does not exercise its discretion. Instead, the district court construes the language of the class definition in much the same way that a court might construe the language of a contract or a statute. We therefore conclude that we should review de novo the district court's analysis of the language of the class definition. *Cf. Miller v. Safeco Title Insurance Co.,* 758 F.2d 364, 367 (9th Cir.1985) (holding that a district court's analysis of contract language is reviewed de novo).

The National Cement Class consisted of entities "that have purchased for delivery within the United States cement from any cement manufacturer." Thus, the plain language of the class definition encompasses entities harmed by purchasing cement, not those harmed because they were not permitted to purchase cement. Moreover, language in the district court's order certifying this class indicates that the class was intended to cover only those

harmed by some form of price-fixing conspiracy. The court found that the question common to the claims of the class was "whether any of the defendants conspired to fix prices, allocate customers or standardize credit terms." The court affirmed the nationwide scope of the class specifically because of the evidence of nationwide price-fixing. Furthermore, when concluding that the impact of the defendants' acts was not individualized, the court stated that "an illegal price fixing scheme presumptively impacts upon all purchasers of a price fixed product." Finally, the plaintiffs recognized in their motion for class certification that "only the purchase of cement or ready-mix at elevated price levels . . . is germane to this litigation." Nowhere in the class certification proceedings did the district court or the parties refer to claims based upon a concerted refusal to deal. We therefore hold that the district court properly concluded that refusal to deal claims were not within the scope of the class action.

V

The district court also ruled that "[c]laims will not be allowed for any State civil penalties." California, Alabama, and Minnesota (the States) argue that, because they expressly released in the settlement agreement their state civil penalty claims, they are entitled to participate in the settlement fund as a matter of contract law. This argument misses the mark, however, because the critical issue is not whether the States gave consideration in the settlement agreement, and therefore have an enforceable contract. Instead, the issue is whether those bound by the settlement agreement have waived the right to challenge the validity of the States' civil penalty claims. We review de novo the interpretation of contract language but defer to the district court's findings of fact with respect to

extrinsic evidence necessary to interpret a contract. *See Miller v. Safeco Title Insurance Co.*, 758 F.2d 364, 367 (9th Cir.1985).

We conclude that the parties to the settlement agreement retained the right to challenge the state civil penalty claims. In approving the settlement agreements, the district court did not determine *"any of the disputed issues of fact or law involved in the litigation"* (emphasis in original). As stated previously, the court explicitly retained jurisdiction "for the purpose of supervising and directing the administration of the settlements and distribution of the Settlement Funds." Furthermore, correspondence between counsel for the parties shows that they understood that the settlement agreements left unresolved the validity of the various state law claims. For example, correspondence between the parties relating to the settlement agreement declares that "[a]ll questions relating to allocation of the settlement proceeds have been preserved to a later date, without any waiver and/or commitment by anyone with regard to the formula which will be adopted." Thus, although the settlement agreements gave the parties the right to argue that the state civil penalty claims are valid, the agreements did not resolve that or any other issue pertaining to which claims would be compensated from the fund. Accordingly, the States' contention that they have a contractual right to participate in the settlement fund through their state civil penalty claims is without merit.

Turning then to the rejection, the district court did not express a reason for disallowing civil penalty claims. Nevertheless, we need not decide whether the court should have included a "reasoned response" to the objections of civil penalty claimants, *see Mandujano v. Basic Vegetable Products, Inc.*, 541 F.2d 832, 836 (9th Cir.1976),

"[b]ecause the parties neither raise the issue nor contend that it affects our jurisdiction." *Spaulding v. University of Washington,* 740 F.2d 686, 694 n. 2 (9th Cir.), *cert. denied,* 469 U.S. 1036, 105 S.Ct. 511, 83 L.Ed.2d 401 (1984). The States have not raised any other objections to the district court's ruling on this issue.

VI

The district court disallowed claims arising from indirect purchases of cement — purchases of cement or products containing cement from a middle level distributor rather than directly from a manufacturer. The court concluded that state statutes purporting to authorize claims by indirect purchasers are preempted by federal law because "[s]uch statutes are clear attempts to frustrate the purposes and objectives of Congress, as interpreted by the Supreme Court in *Illinois Brick* [*Co. v. Illinois,* 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977)]." The question whether federal law preempts state law is an issue of law which we review de novo.

A.

The supremacy clause mandates that "[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; . . . any thing in the constitution or laws of any state to the contrary notwithstanding." U.S. Const. art. VI. The Supreme Court has identified two general ways in which federal law, through the supremacy clause, preempts state law. First, "[i]f Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted." *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 248, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984) (*Silkwood*). Second,

> [i]f Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, . . . or *where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.*

Id. (citation omitted) (emphasis added).

No one argues that Congress intended federal law to occupy entirely the field of antitrust law, nor do we need to reach that issue. We therefore decide the question before us by applying the second, more limited, test for preemption, and examining the relationship of the state indirect purchaser statutes to the purposes and objectives of Congress with respect to the federal antitrust laws.

The Supreme Court described the purpose of federal antitrust laws in the course of two cases. First, in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 892 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968) (*Hanover Shoe*), the Supreme Court held that a defendant in an antitrust suit cannot assert as a defense that the plaintiff did not suffer damages to the extent that the plaintiff passed on any of the defendant's illegal overcharges to the plaintiff's customers (the indirect purchasers). The Court rejected this defense because proving the amount of any passed-on overcharge "would often require additional long and complicated proceedings involving massive evidence and complicated theories." *Id.* at 493, 88 S.Ct. at 2231. In addition, splitting up a potential damage award among direct and indirect purchasers would reduce the incentives for any one person to bring an action. *Id.* at 494, 88 S.Ct. at 2232. As a result, "[t]reble-damage actions . . . would be substantially reduced in effective-

ness," thus interfering with Congress's goal of encouraging private enforcement of the antitrust laws. *Id.*

In a second case, *Illinois Brick,* 431 U.S. 720, 97 S.Ct. at 2061, the Supreme Court held that indirect purchasers could not, except under special circumstances, assert claims under section 4 of the Clayton Act, 15 U.S.C. § 4. The Court reached this conclusion in two steps. The Court reaffirmed the holding of *Hanover Shoe,* again emphasizing that a "pass-on" defense would "add whole new dimensions of complexity to treble-damages suits," *Illinois Brick,* 431 U.S. at 737, 97 S.Ct. at 2070, and would reduce "the effectiveness of those suits if brought by indirect purchasers with a smaller stake in the outcome than that of direct purchasers suing for the full amount of the overcharge," *id.* at 745, 97 S.Ct. at 2074. Given *Hanover Shoe,* the Court then considered whether the indirect purchase theory could be used by plaintiffs rather than defendants. The Court observed that if every plaintiff affected by an overcharge could sue only for the amount it absorbed, treble-damages actions would be subject to the same complications found objectionable in *Hanover Shoe. Id.* at 731-35, 97 S.Ct. at 2067-69. Moreover, the Court recognized that if direct purchasers could bring claims for the full overcharge, any additional lawsuit brought by an indirect purchaser "would create a serious risk of multiple liability for defendants." *Id.* at 730, 97 S.Ct. at 2067. The Court declined to " 'open the door to duplicative recoveries.' " *Id.* at 731, 97 S.Ct. at 2067, *quoting Hawaii v. Standard Oil Co.,* 405 U.S. 251, 264, 92 S.Ct. 885, 892, 31 L.Ed.2d 184 (1972).

Together *Hanover Shoe* and *Illinois Brick* define three purposes or objectives of federal antitrust law in this context: (1) avoiding unnecessarily complicated litigation; (2) providing incentives to direct purchasers to

bring private damages actions; and (3) avoiding multiple liability for defendants. With the contours of federal policy outlined by the Supreme Court in these two cases, we can proceed to determine whether the state indirect purchaser claims made in this case stand as an obstacle to accomplishing fully these objectives.

B.

The state indirect purchaser statutes can be construed two different ways. Under one interpretation, they restrict a plaintiff to suing only for the amount of any illegal overcharge that it has absorbed. With this construction, the state laws directly conflict with federal law. *Illinois Brick* holds that a direct purchaser has a right, under federal law, to claim damages for the entire amount of any overcharge, whether or not he actually absorbed that overcharge. The states are not free to complicate treble damages actions and reduce the incentives for direct purchasers to bring such lawsuits by curtailing a direct purchasers' right to sue for the full over-charge.

The alternative interpretation of the indirect purchaser statutes is that, although they do not affect the rights of direct purchasers, they permit indirect purchasers to bring claims for damages in addition to the claims brought by direct purchasers. We conclude, however, that even with this construction the indirect purchase claims asserted here would impermissibly interfere with the three policy goals outlined in *Hanover Shoe* and *Illinois Brick.*

First, under the latter interpretation. allowing the indirect purchaser claims asserted here would complicate antitrust enforcement. We recognize that the state law indirect purchaser claims could have been brought separately from the federal direct purchaser actions. Thus,

indirect purchaser claims need not necessarily inject excessive complications into direct purchase actions that are based on federal law. Nevertheless, as this case illustrates, given the broad scope of joinder in modern civil actions, the claims of direct and indirect purchasers may often end up in the same lawsuit. Indeed, res judicata principles may require a plaintiff with both direct and indirect claims against a single defendant to bring them together in one lawsuit. *Cf.* Restatement (Second) of Judgments § 24 (1982) (the doctrines of merger and bar extinguish "all rights of the plaintiff" to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose"). If so, complications are unavoidable.

Second, permitting the state law indirect purchaser claims asserted here could also limit the recoveries of direct purchasers and thus reduce their incentives to bring antitrust actions. A defendant's ability and willingness to settle its claims with direct purchasers depends in part on the magnitude of the defendant's other obligations, including its potential obligations to indirect purchaser claimants. To the extent that indirect purchaser claims have been brought or are threatened, a defendant will reduce any offer to compromise with direct purchasers. Furthermore, if antitrust treble damages judgments exhausted a defendant's net assets, then the claims of direct purchasers would have to share the defendant's estate in bankruptcy with the claims of indirect purchasers. These possibilities reduce the expected recoveries of direct purchasers and thus reduce the incentives for direct purchasers to bring private damages actions.

Third, the state indirect purchase claims asserted here conflict most directly with federal policy because they

create the risk of multiple liability for defendants. Recognizing these claims would allow both direct and indirect purchasers to collect for the same damages. The States respond, however, that a state cause of action is not preempted simply because it imposes a harsher remedy than federal law for conduct that is a violation of both federal and state law. This proposition may be true as a general matter. Nevertheless, it does not apply where, as here, an express federal policy condemns multiple liability for antitrust defendants. The Supreme Court has not attempted to define the basis of this policy, nor need we. The Supreme Court has held unequivocally that the policy against multiple liability exists and has not hesitated to make repeated reference to it. *See, e.g., Associated General Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519, 544, 108 S.Ct. 897, 911, 74 L.Ed.2d 723 (1983); *Blue Shield of Virginia v. McCreedy,* 457 U.S. 465, 474-75, 102 S.Ct. 2540, 2545-46, 78 L.Ed.2d 149 (1982); *see also Illinois Brick,* 431 U.S. at 781 n. 11, 97 S.Ct. at 2067 n. 11 ("a little slopover on the shoulders of the wrongdoers" is unacceptable). We are bound by the Supreme Court's pronouncements on this issue.

The States also make the related argument that the Supreme Court has only determined that *federal* law does not impose multiple liability; state legislatures are free, they contend, to impose multiple liability as a matter of state law. But it is clear that the state law claims asserted here, if generally allowed, would create the possibility that federal law would impose multiple liability. If a state indirect purchaser claim is adjudicated or settled before a federal claim by the related direct purchaser, then one of two consequences must follow: either (1) the federal direct purchaser claim is barred, or (2) the direct purchaser can also collect trebled damages based on the full amount of the overcharge, thereby imposing multiple

liability on the defendant as a matter of federal law. Either consequence would conflict with express federal policies.

Finally, appellant Minnesota argues that its statute avoids any confict with federal law because express language in the statute requires it to be applied so that defendants are not subject to duplicative liability. *See Minn.Stat.* § 825D.57 (1984). It may be that some indirect purchaser claims made under state law would not conflict with federal law. For example, indirect purchaser claims may be valid if, under state law, they accrue only after the statute of limitations has run for direct purchase claims. In that situation, arguably, indirect purchaser actions would not pose a risk of complicating direct purchaser actions or inflicting multiple liability on defendants. We need not address that issue, however, because the indirect purchaser claims asserted here, including those arising under the Minnesota law, would have interfered with the claims of the direct purchasers. This lawsuit involves a class action brought on behalf of and that tolled the limitations period for *all* direct purchasers. Moreover, the settlement fund in dispute was created out of a settlement with the class of *all* direct purchasers. This is not a case where an indirect purchaser has filed a lawsuit after his seller (the direct purchaser) failed to bring an action within the limitations period. Therefore, the claims asserted here created "a serious risk of multiple liability." *Illinois Brick,* 431 U.S. at 730, 97 S.Ct. at 2067.

The primary cases cited by the States in support of their argument that federal law does not preempt the indirect purchaser claims asserted here are distinguishable. In *Silkwood,* 464 U.S. 238, 104 S.Ct. at 615, the Court held that federal law regulating nuclear energy facilities does not preempt an award of punitive damages under

state tort law for conduct related to radiation hazards. *Id.* at 256, 104 S.Ct. at 625. *Silkwood,* however, did not present the same conflict present here because no federal law grants a private cause of action for radiation-related injuries. *See Id.* at 254, 104 S.Ct. at 624 (Congress rejected suggestion that it adopt a federal tort to replace existing state law). Therefore, in *Silkwood,* state law had no opportunity to conflict with federal policies embodied in a federal law authorizing private damage actions.

In *Cancellier v. Federated Department Stores,* 672 F.2d 1312 (9th Cir.) (*Cancellier), cert. denied,* 459 U.S. 859, 108 S.Ct. 131, 74 L.Ed.2d 113 (1982), we held that the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, does not preempt an award of tort damages on pendent state claims. *Cancellier,* 672 F.2d at 1318. We expressly found, however, that the state contract and implied covenant claims at issue in that case "did not duplicate" the ADEA claims. *Id.* By contrast, indirect purchaser claims are aimed at recovering for the identical antitrust violations and the identical damages claimed by the direct purchasers.

We hold that the state law claims in this case based on indirect purchases of cement that do not fall within any exception to the rule of *Illinois Brick* are preempted because they stand "as an obstacle to the accomplishment of the full purposes and objectives" of federal antitrust law. *Silkwood,* 464 U.S. at 248, 104 S.Ct. at 621.

C.

Finally, the States reiterate their argument that, because they expressly released in the settlement agreement their indirect purchaser claims, they are entitled to participate in the settlement fund as a matter of contract law. They bolster this contention by citng authority for

the proposition that a party to a contract who compromises an unliquidated claim has given good consideration irrespective of whether the claim was in fact valid. As pointed out in section V of this opinion, however, it is clear from the record that, like the state civil penalty claims, the parties to the settlement agreement did not waive their right to challenge the indirect purchase claims. To cite but one of several examples, in a letter accompanying California's executed copy of one of the settlements, California expressly acknowledged that the parties disagreed about whether claims would be allowed based upon indirect purchases. The letter concludes that "[f]ailure to achieve an agreement on this issue among plaintiffs will necessitate resolution by the court." For the same reasons we rejected the States' civil penalty claims, we reject their contention that they have a contractual right to participate in the settlement fund based on their release of the indirect purchase claims.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MDL DOCKET NO. 296 PHX-MLR

IN RE CEMENT AND CONCRETE
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

ALL CEMENT ACTIONS.

PRETRIAL ORDER NO. 122
RE: PLAN OF DISTRIBUTION OF
THE NET SETTLEMENT FUND

[Filed January 23, 1985]

The "Important Notice to Purchasers of Cement and Cement-Containing Products Regarding Class Action Settlement and Decertification of the National Cement Class" (dated July 27, 1984) having summarized the proposals for the distribution of the Net Settlement Fund, and having invited members of the National Cement, California Governmental and Oregon Governmental classes to comment on the proposed plans of distribution of the Net Settlement Fund described in the following memoranda: (1) "Plaintiffs' Proposals For Formulating a Plan of Distribution" (filed July 25, 1984); (2) "State of Kansas' Position Regarding Proposals For Formulating a Plan of Distribution" (filed August 6, 1984); and (3) "Plan of Distribution Proposed by State of California (Corrected Copy)" (filed August 24, 1984), and each of these documents having been available for

review at the Clerk's office and having been mailed to each class member requesting a copy; and

The following comments and/or objections to the plan of distribution having been filed: (1) "Defendants' Statement in Response to Plan of Distribution Proposed by State of California" (postmarked August 17, 1984); (2) letter from counsel for Fabcon, Incorporated (postmarked September 24, 1984); (3) "Position of General Paving Company Incorporated, an Illinois Corporation, Regarding Proposals for Formulating a Plan of Distribution" (postmarked September 24, 1984); (4) "Written Statement of M.P.S. Industries, Inc., Monnah Park Block Co., Inc. and I. E. Shilling Company Concerning Proposed Plans of Distribution" (postmarked September 25, 1984); (5) "Plaintiff Robert B. Hertel's Comments on Plaintiffs' Proposals For Formulating a Plan of Distribution" (postmarked September 25, 1984); (6) "Statement of Gulf Oil Corporation Concerning Plaintiffs' Proposals for Formulating a Plan of Distribution" (postmarked September 25, 1984); (7) Objections of Class Members ARC America Corporation, et al. to Proposed Plan of Distribution for the Settlement Funds" (postmarked September 25, 1984); (8) Arizona Ready-Mix Companies' "Written Statement of Comments and Objections to Proposed Distribution Plan and Request to Appear at Hearing" (postmarked September 25, 1984); (9) "Statement of Colorado Concrete Mfg. Co. in Opposition to Certain Plans of Distribution of Settlement Funds" (postmarked September 27, 1984); (10) "Claim of Commonwealth of Massachusetts" (postmarked October 1, 1984); (11) "County of Los Angeles and Los Angeles County Flood Control District Position on Plan of Distribution" (postmarked October 11, 1984); (12) "Statement of Plaintiffs Arizona Slump Block, Inc. and Smith & Green Corp. Concerning Proposed Plans of Distribution" (postmarked October 12, 1984); (13) "Plaintiff Robert B. Hertel's Supplemental Comments on Plaintiffs' Proposals for Formulating a Plan of Distribution" (postmarked October 26, 1984); and (14) letter from Roy M. Wilbur (postmarked November 2, 1984); and

The following reply memoranda having been filed: (1) "Statement of State of California in Reply to Objections to Certain Plans of Distribution Regarding the Net Settlement Fund" (dated October 25, 1984); (2) "State of Arizona's Reply Memoranda Regarding Plan of Distribution" (dated October 26, 1984); and (3) "Arizona Ready-Mix Companies' Responses to 'State of Arizona's Reply Memoranda Regarding Plan of Distribution'" (dated October 31, 1984), and the "Claim of State of California for Allocation of a Share of the Settlement Fund for Releasing its Civil Penalty Claims" have been lodged with the Court on November 6, 1984; and

Due consideration having been given to the foregoing proposals, comments, objections and replies regarding the plan of distribution of the Net Settlement Fund, and the files and records herein, and a hearing having been held on November 9, 1984, during which the comments of counsel and any class member wishing to be heard were considered, and the Court having made certain rulings and having taken certain matters under advisement at said hearing; and

This Court having taken under advisement at the November 9, 1984 hearing issues relating to the appropriate treatment of the claims of the Arizona Ready-Mix Companies, Arizona Slump Block, Inc. and Smith & Green Corp. in the plan of distribution, and due consideration having been given, and this Court having ruled in an order entered November 23, 1984 that the Arizona Ready-Mix Companies are entitled to share in the distribution of the

Net Settlement Fund, and having further ruled that Arizona Slump Block and Smith & Green Corp. are not members of the plaintiff class of direct purchasers and are not entitled to share in the distribution of the Net Settlement Fund, and objections having been filed by Arizona Slump Block and Smith & Green Corp. to said order, and motions to set aside said order or in the alternative to amend said order having been made by them, and a hearing having been held on January 14, 1985 during which counsel and any class member wishing to be heard on said motions were heard, and due consideration having been given; and

Plaintiff State of Arizona having filed (a) a Notice of Appeal from the decisions of this Court announced during the November 9, 1984 pretrial conference, and (b) a motion to stay mailing of notice to class members of this Court's November 9, 1984 rulings relating to the plan of distribution pending resolution of said appeal, and a hearing having been held on January 14, 1984 during which all counsel and class members wishing to be heard on the State of Arizona's motion were heard, and due consideration having been given.

IT IS HEREBY ORDERED that:

1. Distribution of the Net Settlement Fund will be by pro-rata allocation of all approved claims for allowable purchases from settling and non-settling cement manufacturers, with no weighting of claims based upon whether a purchase was made from a settling or non-settling cement manufacturer.

2. Claims will not be allowed for indirect purchases of cement or cement-containing products unless such claims fall within one of the presently recognized exceptions to the rule enunciated by the Supreme Court in *Illinois*

Brick Co. v. Illinois, 431 U.S. 720 (1977). The indirect purchaser claims advanced by the States of Alabama, California and Minnesota pursuant to their respective state statutes which purport to authorize recovery for indirect purchases are disallowed. Such statutes are clear attempts to frustrate the purposes and objectives of Congress, as interpreted by the Supreme Court in *Illinois Brick*, and, accordingly, *are preempted by federal law.*

3. *Claims will not be allowed for any State civil penalties.*

4. No claim based on purchases from a non-settling cement manufacturer will be paid from the settlement fund unless the claimant agrees to waive any right he may have to proceed against any non-settling cement manufacturer for a recovery based on such purchases. Accordingly, each claimant whose previously-filed claim includes purchases from any non-settling cement manufacturer shall be given the option of: (a) withdrawing that portion of his previously-filed claim which seeks recovery for purchases from any non-settling cement manufacturer; or (b) affirmatively waiving and relinquishing any causes of action which were the subject matter of this litigation against said non-settling cement manufacturer(s). Any claimant whose claim includes purchases from any non-settling cement manufacturer who does not (1) withdraw that portion of his claim which seeks recovery for purchases from a non-settling cement manufacturer; or (2) affirmatively waive all causes of action which were the subject of this litigation against said non-settling cement manufacturer(s) shall have his pro-rata allocation of the Net Settlement Fund placed into an escrow account until expiration of the statute of limitations period on the causes of action which were the subject of this litigation against non-settling cement manufacturers, following

which time the pro-rata allocation will be distributed to that claimant if he is not a plaintiff in any action for recovery from any non-settling cement manufacturer based upon the causes of action which were the subject of this litigation. If a claimant is a plaintiff in any such action for recovery from any non-settling cement manufacturer, that claimant's pro-rata allocation will be held in escrow until the conclusion of that litigation, at which time it will be treated as proved in Paragraph 5 below.

5. Any claimant who has received or may receive any amount by settlement or compromise of any claims or causes of action which were the subject of this litigation from any non-settling cement manufacturer shall have the amount so received deducted from that claimant's allocated share of the Net Settlement Fund prior to distribution unless said claimant withdraws any claim against the Settlement Fund based on purchases from such non-settling cement manufacturer pursuant to paragraph 4 above.

6. The motion of plaintiff Arizona Slump Block, Inc. "To (1) Set Aside Order Dated November 21, 1984 or (2) In the Alternative, to Amend Said Order" is granted to the extent that it clarifies the November 21, 1984 Order to make clear that claims based on direct purchases of cement or cement-containing products will be allowed, subject to verification by the normal claims processing procedure. Claims based upon a refusal to deal will not be allowed.

7. The motion of plaintiff Smith & Green Corp. "To (1) Set Aside Order Dated November 21, 1984 or (2) In the Alternative to Amend Said Order" is granted to the extent that it clarifies the November 21, 1984 Order to make clear that claims based on direct purchases of cement or cement-containing products will be allowed,

subject to verification by the normal claims processing procedure. Claims based upon a refusal to deal will not be allowed.

8. That portion of the Court's November 23, 1984 Order providing that the Arizona Ready-Mix Companies are included in the plaintiff class previously certified herein and are entitled to share in the distribution of the Net Settlement Fund is hereby affirmed.

9. The motion of plaintiff State of Arizona "For Stay of Notice to Claimants Pending Appeal" is denied.

10. On or before the day that Judgment is entered on this Order as provided below, Notice of the approved plan of distribution in the form attached hereto as Exhibit A shall be disseminated by First Class United States Mail to each claimant in this litigation.

IT IS HEREBY CERTIFIED that:

1. There is no just reason for delay in entry of judgment upon this Order.

2. The interests of justice will be best served by expediting any appeal which may be taken from this Order.

IT IS FURTHER ORDERED that:

1. The Court expressly directs entry of final judgment upon this Order pursuant to Rule 54(b), Federal Rules of Civil Procedure, not less than ten days after the entry of this Order.

DATED: January 21, 1985

/s/ MANUEL L. REAL

HONORABLE MANUEL L. REAL
Chief United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOS. 84-2685, 85-1670 and 85-1722 to 85-1724

In Re: CEMENT AND CONCRETE ANTITRUST LITIGATION

STATE OF ALABAMA, STATE OF ARIZONA, STATE OF CALIFORNIA, and STATE OF MINNESOTA,
Plaintiffs/Appellants,

vs.

PORTLAND CEMENT ASSOCIATION, et al.,
Defendants,

and

CITY OF AUSTIN, et al.,

and

ARC CORPORATION, et al.,
Class Members/Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Alabama, Arizona, California and Minnesota, appellants in the above-named proceeding, hereby appeal to the United States Supreme Court from the decision of this Court reported at 817 F.2d 1435 (9th Cir. 1987). Appellants timely filed Petition for Rehearing and Suggestion for Rehearing En Banc was denied by this Court on February 9, 1988.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

DATED: May 4, 1988

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APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MDL DOCKET NO. 296 PHX-MLR (MS)

In Re: CEMENT AND CONCRETE
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:

ALL CEMENT ACTIONS

PLAINTIFFS' JOINT NARRATIVE SUMMARY OF LITIGATION AND STATEMENT OF CENTRAL FACTS AND LEGAL ISSUES

"This is an uncomplicated industry we're in. We've got one product sold at one price."

— Lee Cummings, Lehigh Portland Cement Company, at the Portland Cement Association Market Research Seminar, Chicago, Illinois, October 18-19, 1972 (PCA 5803)

In accordance with paragraph 4 of Pretrial Order No. 82, plaintiffs respectfully submit their joint narrative summary of this litigation and their statement of the central factual and legal issues.

I.

PLAINTIFFS' NARRATIVE SUMMARY OF LITIGATION.

Plaintiffs and the classes seek monetary and injunctive relief for a nationwide conspiracy to fix prices for cement and cement-containing products in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. Plaintiffs contend that

the cement industry operates as a cartel centered around three nationwide trade associations, the PORTLAND CEMENT ASSOCIATION, the NATIONAL ASSOCIATION OF CEMENT SHIPPERS and the CEMENT CREDIT DIVISION. This cartel governs virtually every aspect of the manufacture and sale of cement, ranging from agreements on the rate of return to be received by the industry and the formula for calculating transaction prices to standardization of credit terms, product specifications and even trivial details such as nighttime unloading allowances. When the cement industry was experiencing soft prices and low profits during the 1960s, the cartel agreed to and did increase the industry's rate of return through conspiratorial price increases. Plaintiffs and the classes seek damages to compensate for the overcharges and an injunction to dismember the cartel.

Extensive discovery has been conducted,[1] numerous motions decided,[2] and seven settlements reached with the total settlement fund now more than $42 million.[3] All that remains are the final pretrial stages. Discovery will be focused on narrowing the issues for trial by determining which of plaintiffs' contentions are admitted and which are denied. So long as there is no substantial controversy over the authenticity and foundation of documents to be offered at trial, relatively few depositions remain to be taken. There will be discovery on damages and this

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[1] *See* Plaintiffs' and Defendants' Joint Summary of Discovery Conducted to Date, filed September 6, 1981.

[2] *See* Plaintiffs' Joint Summary Statement of Principal Rulings to Date, filed September 6, 1983.

[3] The seven settlements and their respective dates and amounts are as follows:

litigation will then be ready for trial beginning in September 1984.

II.

DEFENDANTS COMBINED AND CONSPIRED TO INCREASE CEMENT PRICES AND THE RETURN ON INVESTED CAPITAL IN CONNECTION WITH THE MANUFACTURE AND SALE OF CEMENT

The nationwide cement price increases beginning in the late 1960s and continuing through the time of suit resulted from defendants' conspiratorial elimination of the soft prices and low profits prevalent in the cement industry during the 1960s. To remedy the situation, defendants and their co-conspirators agreed to improve the indus-

Settling Defendant (date lodged)	Amount	Market Share	Settlement Ratio
River Cement (7/31/79)	$1,750,000	1.29%	$1,356,589
Gifford-Hill/Amcord (8/15/80)	8,250,000	5.24	1,574,427
Southdown/Southwestern (9/18/80)	6,625,000	2.67	2,481,273
California Portland (9/18/80)	6,315,000	2.49	2,536,144
Northwestern (3/16/81)	2,300,000	0.87	2,643,678
Atlantic (3/30/81)	5,000,000	1.85	2,702,703
Penn-Dixie (10/23/81)	1,955,000	2.30	850,000
Total	$32,195,000	16.71%	

Penn-Dixie was in bankruptcy at the time it entered into its settlement and its settlement ratio therefore did not continue the progression established by the earlier settlements. After the addition of interest earned and the deduction of Court- approved expenses, the total settlement fund now exceeds $42 million.

try's profitability through a series of collusive price increases. Even in the face of low rates of capacity utilization which would have dictated lower prices in a competitive marketplace, cement prices were to be increased to a level sufficiently high to yield defendants' desired rate of return. This target figure was stated by different people at different times as 10.0 percent, 12.5 percent, 14.0 percent or simply as the average of rates earned in other manufacturing industries. Common to all these formulations, however, was defendants' intention to increase their prices and rate of return to levels above those which they were receiving or which they would have received in a competitive marketplace. Defendants increased their prices in accordance with their agreement.

A. Defendants Formed Their Conspiracy in Response to the Soft Prices and Low Profits Which Prevailed in the Cement Industry During the Early 1960s

PORTLAND CEMENT ASSOCIATION President Robert D. MacLean described the soft prices and low profits which were experienced by the cement industry during the 1960s:

> The cement industry entered the post-World War II construction boom with antiquated production equipment, which it began to replace with new plants in the 1950s. In the last half of that decade alone new capacity was added amounting to 22 million tons in anticipation of a continuation in the demand growth then being experienced. It is certainly no accident that this enormous increase in capacity occurred during precisely those years when the industry's profitability was out in front of most other manufacturing industries. Return on equity in 1955 was nearly 15 percent, and it rose to 17 percent in 1956.

. . . .

By 1961, as a result of the new plants that had been built coincident with an unexpected fall off in consumption, capacity utilization had dropped to 70 percent. Prices began to plummet under severe competition, and profits declined sharply. This downward trend continued .... For this period, the return on equity was the lowest in the cement industry's recent history, and was as follows:

1968 — 6.4 percent
1969 — 6.7 percent
1970 — 4.5 percent

(PCA 1609-1610)

In order to reverse the "plummet" in cement prices and to increase the industry's profitability, defendants and their co-conspirators agreed to "commence an educational campaign" to put an end to price-cutting and to bring about increases in cement prices. This "educational campaign" apparently originated with a memorandum authored by John C. Mundt of LONE STAR which said, in part:

1. We shall commence an educational campaign to encourage the cement industry to react more intelligently to supply/demand relationships.

2. We shall contend that price cutting is not the answer to rival theories of industry organization.

3. We shall advocate strengthening the PORTLAND CEMENT ASSOCIATION and joint cement-concrete industry promotional efforts.

4. We shall eliminate unnecessary distribution costs by (a) high grading our markets, and (b)

terminating the "long haul" abuses of customer pickup.

(LSI 510007-510008)

One of the aspects of this "educational campaign" was the formation of the Subcommittee on Market Research of the PORTLAND CEMENT ASSOCIATION General Promotion Committee. (PCA 66656-66659) This Committee sponsored periodic "Market Research Seminars" for defendants' sales executives where they "delivered ... harangue[s] on industry pricing practices" (NGC 36094-36095) and urged "that the cement industry should be receiving approximately 33 cents a barrel, or about $140 million, more for cement today than it is, if it is to earn an adequate return on the capital invested" (PCA 5356-5365), and where Lee Cummings said simply, "We've got one product sold at one price." (PCA 5803) This Subcommittee also developed "SMASHED" a computerized management decision game which indoctrinated defendants' sales personnel into adherence to their pricing formula. (*See* Plaintiffs' Interrogatory Answer to Nos. 11(b) and 12(b).)

The "educational campaign" was also carried out through frequent trade association meetings, speeches and published articles. As KAISER's chief executive officer Peter S. Hass admitted, discussion of price trends occurred "everywhere"[4] and there were too many to be

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[4]Hass testified:

Q. Did you have an absolute policy at KAISER never to discuss even price trends in front of competitors? A. No.

Q. You could discuss price trends in front of competitors? A. Trends, yes. Trends were discussed everywhere.

(Deposition of Peter S. Hass, April 22, 1980, at 262-63)

detailed in this memorandum.[5] Three representative examples, however, will show how defendants formed and implemented their conspiracy.

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[5]These various conspiratorial speeches and acts are described more fully in section I of Plaintiffs' Answer to Interrogatory No. 3(b). Excluding those mentioned in the text: they include in chronological order the speech "Commercial Problems and Possibilities in the Cement Industry" prepared by John C. Mundt of LONE STAR for the June 27, 1968, Annual Minerals Processing Maintenance Symposium (LSI 32876-33894); the "harangue on industry pricing policies" by John P. Flynn of LONE STAR at the September 17-18, 1968, PORTLAND CEMENT ASSOCIATION Market Research Seminar (NGC 36094-36095); the speech "Abandon or Replace" by E. G. Cambeilh of LONE STAR to the October 24, 1968, meeting of the Cement Industry Roundtable (USS 44577-44584); the speech "Blueprint for a Better Concrete/Cement/Aggregates Industry" by John C. Mundt of LONE STAR to the January 28, 1969, annual conventions of the National Sand and Gravel and the National Ready Mixed Concrete Associations (KCG 507508-507528; LSI 32856-32871; NRMCA 27-35); the speech "The Profit-Less Cement Industry" by Roy A. Grancher of MARTIN MARIETTA to the March 14, 1969, PORTLAND CEMENT ASSOCIATION Salesmen's Seminar (MMC 21696-21712; MMC 23529-23538); the article "Why Cement Failed" by Roy A. Grancher of MARTIN MARIETTA in the May 1969 issue of *Rock Products* (KEY 6534-6538); the article "Cement 1970: Poised for a Breakthrough" by John C. Mundt of LONE STAR in the February 1970 issue of *Mining Congress Journal* (KCG 494393-494402; LSI 32850-32855; WCM 1904-1909); the article "Cement in the 70's — Lone Star's View" by John C. Mundt of LONE STAR in the April 1970 issue of *Minerals Processing* (OKC 7246-7249; WCM 1897-1900); the speech by Dow Ostlund advocating stopping "an industry suicide pattern of price cutting" to the April 22, 1970, PORTLAND CEMENT ASSOCIATION Pacific Southwest Region Regional Planning Meeting (KCG 300085-300091; KCG 476729-476735; LSI 10287-10314; PCA 4183-4199); the article "Cement: Profitless Prosperity?" by Roy A. Grancher of MARTIN MARIETTA in the May 1970 issue of *Rock Products* (FTC 120448-120454; LSI 10073-10082; USS 4418-4423); the speech "Cement in the Seventies" by PORTLAND CEMENT ASSOCIATION Chairman William J. Young of LEHIGH to the January 27, 1971, annual conventions of the National Sand and Gravel and the National Ready Mixed Concrete Associations (AMC 7801-7812; CPC 65268-65277; DUN 2217-2233; MOT 20394-20406; SAPC 3223-3232); the speech "Concrete Is an Association: E Pluribus Unum" by John C. Mundt of LONE STAR to the February 16, 1971, meeting of the Toledo Area Concrete Improvement Association (FIL 39253-39270; KEY 402-422; MOT 21158-21175; MOT 35361-35379; ORE 4516-4522); the speech "The Cement Industry's Age of Reason" by Roy A. Grancher of MARTIN MARIETTA to the February 28-March 4, 1971, meeting of the American Institute of Mining Engineers (IBI 248395-248430) repeated at the May 20-21, 1971, meeting of the Cement Credit Division; the report by PORTLAND CEMENT ASSOCIATION Chairman William J. Young of LEHIGH to the May 13-14, 1971, Annual Meeting of the PORTLAND CEMENT ASSOCIATION (KCG 41021-41024); and the speech "Status of the Cement Industry" by Mayfield R. Shilling of IDEAL at the October 11-14, 1971, meeting of the American Mining Congress (KCG 507047-507048).

At the February 28, 1968, annual meeting of the American Institute of Mining, Metallurgical and Petroleum Engineers, John C. Mundt of LONE STAR delivered a speech entitled "The Marketing of Cement and Concrete." (KCG 525067-525079; LSI 32840-32849) Mundt said that an "imbalance of supply and demand in the cement industry" had led to "price deterioration." Noting that "[t]he behavior of cement prices has been disastrous," Mundt said that "this can be corrected" and that "[f]irst, there should be improvement in price, even in the short run and despite apparent over-capacity." Mundt urged that the cement industry increase its prices sufficiently to "ensure remunerative pricing levels" and guarantee "a minimum 10 percent after tax return" even though the available supply of cement might be far in excess of the demand for the product:

> We think this can be corrected. If other manufacturing industries can enjoy remunerative pricing

> levels despite unspectacular operating rates, so can we. It is clear that 1969 cement and concrete prices must reach higher levels than the past. Together with operating economies, they should be designed to produce a minimum 10 percent after tax return on total capital employed. These higher prices for both cement and concrete are absolutely necessary for legitimate "cost-push" reasons. We feel that the profit pinch in the industry will produce these higher price levels, and that economic pressures keeping prices down will abate.

(LSI 32843-32844)

Another example of the "educational campaign" was the speech "Current Economics of the Portland Cement Industry" by Joseph E. Muckley of MARTIN MARIETTA to the May 10, 1968, General Luncheon Session of the Annual Meeting of the PORTLAND CEMENT ASSOCIATION. (ATL 39192-39198; KEY 469-475; PCA 72278-72289; USS 4588-4592) Just as Mundt had complained of "price deterioration," Muckley noted the low return on capital and the "flat price pattern" in the cement industry and — like Mundt — stressed the need "to develop pricing levels on the basis of return on investment." Muckley went much further than Mundt, however, by actually recommending to his erstwhile competitors that the cement industry make an across-the-board price increase of 40- to 50- cents per barrel in the aggregate amount of approximately $110 million in order to return cement prices and cement company profits to the desired level:

> Turning back to the financial results of the primary producers (Figure 4), you will see that their net worth amounted to $1,135,000,000. To have earned 12.5 percent on this net worth in 1967 would

> have required net income of $142,000,000 as opposed to net income actually earned of $73,700,000. The difference is some $68,000,000 or on a pre-tax basis it would probably be around $110 million. This translates itself into something between 40¢ and 50¢ per barrel of cement.

Muckley's recommended solution to the "flat price pattern" lay in the cement industry's acting as a monopolistic cartel rather than as a number of independent competitors. Individual companies should not pursue what they believed to be in their own short-term best interests but should instead exercise "a high degree of self-discipline," act as if "one of us owned all of these 180 cement plants," and adopt "a sophisticated, long-range approach to provide . . . cement at a price that is . . . adequate for us as producers."

The first example of defendants' "educational campaign" consists of the two talks by Ralph L. Browning of LEHIGH to PORTLAND CEMENT ASSOCIATION meetings in the Fall of 1969. Browning first gave his talk "Cement: Industry in Transition" to the September 15-16 1969 PORTLAND CEMENT ASSOCIATION Market Research Seminar. (PCA 5356-5365; PCA 73029-73048; NGC 36083-36095) His argument "that the cement industry should be receiving approximately 33 cents a barrel, or about $140 million, more for cement today than it is, if it is to earn an adequate return on capital invested" was soundly endorsed and PORTLAND CEMENT ASSOCIATION Secretary Charles W. Reene invited Browning to repeat this speech to the Fall Meeting of the PORTLAND CEMENT ASSOCIATION and to place "additional emphasis" on "the erosion of profits due to depressed prices over several years." (PCA 73020-73021; PCA 73226-73229)

Browning accepted the invitation and repeated his speech at the November 10, 1969, General Session of the PORTLAND CEMENT ASSOCIATION Annual Meeting. To a large extent, the text followed that given at the Market Research Seminar two months earlier. When Browning turned to the amount of future price increases, however, he raised his sights from the figures used two months earlier. In September he had advocated an increase to $4.14 per barrel, but at the Annual Meeting Browning's target figure was increased to $4.26 per barrel. In September, Browning would have been content with a $140 million industry-wide price increase bringing the industry's profits to $500 million annually, but two months later he was advocating a price hike of $195 million so that total industry profits would reach approximately $550 million annually. Finally, when Browning spoke in September, he advocated a price hike of 33- to 35-cents per barrel but in November his recommendation was 45- to 50-cents per barrel. Relying upon graphic slides, Browning presented his detailed argument to the other industry leaders why and how much cement prices should be increased:

> Here is a chart where we have attempted to estimate the average price received per barrel of cement sold each year from 1950 through 1968. We have continued that trend-line through 1980.
>
> The cement industry's price performance over the last eighteen years projects forward to future increases in price of only 2¢ a barrel per year.
>
> What is a fair price for Portland Cement? . . . [W]e have a Net Worth of $2,750,000,000. This should earn 20 percent before taxes — or approximately $550,000,000.

> Earlier, you will recall that the total cost to produce and sell a barrel of Portland Cement was $2.97. If the average price received was $4.26, the resultant profit per barrel would be $1.29 — or approximately $550,000,000.
>
> This suggests that the cement industry should be receiving approximately 45¢ a barrel . . . or about $195 million . . . more for cement today than it is, if it is to earn an adequate return on the capital invested.
>
> . . . .
>
> Let us again look at the chart on prices — showing actual prices received from 1950 through 1968; and a trend-line of our experience through these eighteen years continuing through 1980; and a second trend-line which suggests the average price that the cement industry should receive during the remaining twelve years through 1980.
>
> Net, the cement industry has been able to project increases in price only 2¢ a barrel per year during the last eighteen years. *If the cement industry is to receive an adequate return on capital, it must be able to generate increases on an average of about 13¢ a barrel annually during the next twelve years. This is six times the industry's present performance.*

Browning's final recommendations were also much stronger than those he gave at the Market Research Seminar:

> The industry must be far more successful in its efforts to secure a reasonable price. Under most difficult conditions, it will have to exhibit far greater management ability than it has to date, if it is to receive a price that will afford an adequate return on investment.

(PCA 73207-73225; SAPC 1205-1213; KEY 458-469) Browning obviously followed PORTLAND CEMENT ASSOCIATION Secretary Charles W. Reene's recommendation that he put "additional emphasis" on the problem of the "erosion of profits due to depressed prices."

Defendants heeded Browning's exhortation to increase prices and in rapid order a number of defendants who had listened to Browning began to follow his advice. On November 25, 1969, for example, ASH GROVE's John W. Williams had lunch with Lloyd L. Schwarz of U.S. STEEL. (TC 60457-60458) Williams had been present when Browning gave his speech and Schwarz was on the mailing list to receive a printed copy of that speech from the PORTLAND CEMENT ASSOCIATION. Three days after their luncheon meeting, on November 28, 1969, Schwarz called John W. Williams and in his absence spoke with Deahl L. Williams. Schwarz told Williams that U.S. STEEL was issuing its price announcements that day and stated: "The only price that he [Schwarz] was sure of was bulk which was $4.10. He thought the sack price would be $5.10 for portland and $4.60 for masonry. These prices will become effective January 1, 1970." (Deposition of D. L. Williams, at 122-25 and Exhibit 061-004 thereto) After receiving Deahl Williams' memorandum of the telephone call, John Williams noted, "Our men should be on the lookout" (D. L. Williams Deposition Exhibit 061-004), and on December 11, 1969, Deahl Williams wrote to ASH GROVE sales personnel saying, "We have reason to believe that [U.S. STEEL] has mailed quotations quoting prices out of their Hannibal, Missouri mill. Please be on the lookout for one of these quotations and get it into the office as soon as possible." (D. L. Williams Deposition Exhibit 061-003) The price announcements U.S. STEEL mailed November 28, 1969,

were exactly matched by those of ASH GROVE and GENERAL. (FTC 300114-300115)

Similar exchanges of pricing information occurred between other defendants who had heard or received a copy of Browning's speech. On November 26, 1969, Larry McLendon of OKC was advised by an OKC salesman that ALPHA "did quote full prices with the clause that their 1970 prices would be subject to any freight increases that might occur" and that ALPHA would be "sending me a list of all their Louisiana prices" and that he would forward OKC's prices to ALPHA. (AZAG 1356; *see also* FTC F1776 H4V4)

Browning himself had a conversation with James B. Landrum of GENERAL about this time and they talked about future price increase announcements. ("Second Supplemental Responses of General Portland, Inc. to Plaintiffs' Fourteenth Set of Interrogatories, at 94-95, dated October 2, 1981) W. J. Conway of GENERAL testified that GENERAL's net sales price per barrel increased approximately 10 percent in this period from August 1969 through January 1970 while during the same period the quantity of shipments decreased approximately 50 percent but that he had "no recollection of the factors that might have caused" this phenomenon. (Deposition of W. J. Conway, April 2, 1980, at 680-97) While Conway may have had "no recollection" of the reason for this price increase, the jury could well conclude that it resulted from Mundt's "educational campaign" and defendants' other conspiratorial activities.

John C. Mundt of LONE STAR also attended the November 10-12, 1969 meeting where Browning gave his speech and Mundt was on the PORTLAND CEMENT ASSOCIATION mailing list to receive a copy of Browning's speech. In a January 30, 1970, memorandum to

Richard E. Newell, Mundt relied upon Browning's recommendation for a 50-cents per barrel price increase as one of the reasons why LONE STAR should increase its prices 50-cents per barrel:

> TO: R. E. Newell
> FROM: John C. Mundt
> SUBJECT: Pricing in 1971
>
> . . . .
>
> 5. It is interesting to note that in a speech at the Fall Meeting of the PCA, Mr. Ralph Browning of LEHIGH referred to the need of $0.50 bbl. more in the cement industry to produce a fair return.
>
> . . . .
>
> 8. Taking all factors into consideration, it is clear that for 1971 we should think in terms of cement price increases in the range of $0.45-0.50, and not tie these increases down with calendar year guarantees. A $0.50 increase would compensate for inflationary factors during the past few years but not for the period since 1957-59, the base year currently in use.
>
> s/ John C. Mundt

(FTC 5810 93-581095)

Mundt was therefore able to see his "educational campaign" come full circle. Having first formulated his "educational campaign to encourage the cement industry to react more intelligently to supply/demand relationships" and to avoid "price-cutting," he then carried that message to other cement companies through speeches, articles, correspondence and private meetings and conversations. Eventually, his own words came back to him in speeches such as Browning's which Mundt was able to use as justification for LONE STAR's price increases. There is no doubt that the "educational campaign" had industry-

wide effects because in March 1971, Roy A. Gracher of MARTIN MARIETTA was able to report: "PRICES have risen, with the average value of portland cement standing at its highest point in almost eight years. Price increases have been announced generally, and are holding strong." (IBI 248408)

B. In Working to Remove the Obstacle Created by Federal Price Controls, Defendants Reaffirmed Their Earlier Agreement and Created Additional Evidence of that Agreement

Defendants had barely begun benefiting from their industry-wide agreement to increase cement prices and the rate of return in the cement industry when they encountered President Nixon's program of federal wage and price controls. Although the price control program had four distinct phases lasting from August 15, 1971, when President Nixon imposed a price freeze, until November 27, 1973, when the cement industry was exempted, it was "Phase Two" that applied during most of this period. Under Phase Two regulations, firms with annual sales of more than $100 million generally could not increase prices more than was necessary to offset cost increases and they generally could not increae their profit margins to more than they were during the 1968-1970 base period. These aspects of the Phase Two regulations did not apply to firms with annual sales of less than $100 million, however.

The federal price control program affected defendants' agreement to increase cement prices and the rate of return in the cement industry in at least two significant respects. First, by selecting 1968 through 1970 as the base period years for measuring allowable rates of return, the price control program selected "probably the three

worse years in the cement industry's history"[6] and thereby limited defendants to the very rates of return that they had agreed were too low and were to be increased. Second, by conditioning allowable price increases upon individual cost-justification, federal price controls effectively limited cement prices to the level necessary to yield the allowable return for the most efficient producers rather than setting cement prices sufficiently high to permit the least efficient producer to obtain the industry's desired rate of return.[7]

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[6]Deposition of Robert D. MacLean, June 1, 1978, at 110-17; *see also, e.g.* Deposition of Peter S. Hass, April 24, 1980, at 555 ("the base period specified, at least for the cement industry . . . was a period of low profit margins and . . . controls based on simply maintaining those would just perpetuate one of the industry's bad periods indefinitely forward into the future"); Deposition of Jack MacNider, October 15, 1980, at 19-20 ("During those years profits of cement companies had been depressed."); Deposition of A. Cleve Schneeberger, May 2, 1978, at 328 ("injustice so far as the cement industry is concerned with respect to the base years"); Deposition of F.T. Sheets, Jr., June 6, 1980, at 445 ("the base years . . . were not good years"); Deposition of Mayfield R. Shilling, February 8, 1982, at 40 ("I remember the discussion that they felt that we were being unfairly penalized by having controls placed on us and those controls were tied to three years not good for the industry.")

[7](*E.g.,* Deposition of Jack MacNider, October 15, 1980, at 16-17 (price controls "indirectly controlled the prices we were allowed to charge" by "limit[ing] the prices of our larger competitor"); Deposition of A. Cleve Schneeberger, May 5, 1978, at 776 ("one company in the commodity industry receives authorization to raise its prices, it may not be able to do so depending on what other authorizations are ranged by the Price Commission"); Deposition of Roland R. Speers, April 15, 1980, at 230-32 and 236-37 ("if one competitor in a cement market is precluded from raising his prices above a certain level, that tends to be the maximum level that can be charged by any other cement supplier in that market"); PCA 00846-00846A; PCA 01161-01171 ("If Cement Producer A is told he can raise the prices and

Defendants followed two interrelated courses of action during federal price controls in order to be able to increase cement prices and the rate of return in the cement industry. Publicly, defendants focused their efforts on removing the impediment that federal price controls presented to the continuation of their agreement to set cement prices at a level sufficiently high to yield the industry the desired rate of return.[8] Defendants also established a secret "ad hoc committee of company people" consisting of Robert W. Fort of MEDUSA, John R. Kringel of LONE STAR, Charles A. Raper of GENERAL and William J. Young of LEHIGH which was appointed at the November 16, 1971, PORTLAND CEMENT ASSOCIATION Board of Directors meeting (Deposition of Charles W. Reene, March 8, 1978, at 297-304 and Exhibit 055-024 (PCA 00900-00903) thereto) and which — with the assistance of the PORTLAND CEMENT ASSOCIA-

---

Cement Producer B in the same market is held to a lower price level, Producer A won't be able to market his output at the higher price.")

[8]*E.g.,*Deposition of Peter S. Hass, September 10, 1976, at 28; April 23, 1980, at 481 ("when we were talking about rate of return, the feeling was generally that the rate of return wasn't good enough"); Deposition of Robert D. MacLean, June 1, 1978, at 110-17; June 2, 1978, at 218-21, 229-30 and 342; and June 27, 1978, at 562-65; Deposition of F. T. Sheets, Jr., June 2, 1980, at 75-79; ("obtaining a satisfactory economic return in the cement industry" discussed at PORTLAND CEMENT ASSOCIATION general membership meetings during price control period); Deposition of Mayfield R. Shilling, February 8, 1982, at 13-44; Deposition of Fred B. Smales, May 9, 1980, at 40-41 (recalls attending meetings where discussion that cement industry had poor record for return on investment and "obviously had to have some improvement"; improving rate of return discussed at PORTLAND CEMENT ASSOCIATION meetings); Deposition of Frank N. Steadman, Jr., June 10, 1976, at 151 ("There was a lot of discussion within . . . the industry as to when any of the industry would be able to change prices.")

TION — agreed upon and coordinated cement price increases during federal price controls.

As decontrol of the cement industry became imminent in late 1973, PORTLAND CEMENT ASSOCIATION President Robert D. MacLean formulated a plan for controlling the amount of cement price increases immediately following decontrol. MacLean described this plan:

> Q. What was that plan of yours?
>
> A. Well, very simply, Mr. Reed, because of the commodity nature of cement, because of the fact that companies are spread geographically around the country, I felt that we could select a very few larger companies and tell Doctor Dunlop these dozen or so companies sell in every market area in the United States and if you get a commitment from each of these companies as to what, if anything, they would do in regard to prices should the industry be decontrolled, he would have a complete guarantee as to the maximum that prices could go up, if at all, should be decontrol the industry.
>
> I am not certain whether I articulated that plan, but I have a feeling that I did.
>
> Q. Okay. What were the larger companies that you had in mind in formulating this plan?
>
> A. I didn't. At that stage I — I knew that I could select a number of companies, but I did not identify them. I didn't even have a list in my mind at that time.

(Deposition of Robert D. MacLean, July 10, 1978, at 847-48) MacLean presented his plan at an October 5, 1973 breakfast meeting of the PORTLAND CEMENT ASSOCIATION Long Range Planning and Policy Committee to

Mayfield R. Shilling of IDEAL, William J. Young of LEHIGH, Robert W. Fort of MEDUSA, Robert W. Hutton of LONE STAR and Peter S. Hass of KAISER and apparently received their concurrence to proceed. (*Id.*, at 841-50)

To carry out his plan, MacLean enlisted the agreement and assistance of William A. Brobston of ALPHA, Nelson J. Ehlers of FILTROL, Robert W. Fort of MEDUSA; John E. D. Grunow of MARTIN MARIETTA, Robert W. Hutton of LONE STAR, James D. Moran of FLINTKOTE, James E. Poole of MARQUETTE, F. T. Sheets, Jr. of SOUTHWESTERN, Mayfield R. Shilling of IDEAL, James E. Taylor of U.S. STEEL and William J. Young of LEHIGH. (*Id.*, at 869-93) MacLean selected "these dozen or so companies [because together they] sell in every market area in the United States and if you get a commitment from each of these companies as to what . . . they would do in regard to prices should the industry be decontrolled, [there would be] a complete guarantee as to the maximum that prices could go up" following decontrol. (*Id.*, at 847-48) "[A] tacit agreement [was] reached whereby prices [would] rise about 10 percent as of January 1, 1974, and [would] not be increased again during the first half of the year."[9] At least at the time MacLean first formulated his plan, "[i]t [was] difficult to judge precisely what price increases [would] be forthcoming" after the first half of 1974, (KEY 2452-2454) It was clear, however, that those planned price increases would be significant as they in fact turned out to be.

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[9]KEY 2452-2454; *see also e.g.*, Deposition of Peter S. Hass, September 10, 1976, at 45-48; CPC 069131 ("The Cost of Living Council decontrolled the cement industry on November 27, 1973. Shortly thereafter most companies in the industry announced price increases in the range of 10 percent effective January 1, 1974.")

C. Conspiratorial Price Increases Were Implemented Following Decontrol

The agreement which had been forged in the late 1960s, and which had been reaffirmed and secretly carried out by the PORTLAND CEMENT ASSOCIATION and its members during federal price controls, flourished following decontrol. In accordance with MacLean's plan, prices increased relatively moderately in the first half of 1974 and went up more sharply thereafter even in the face of weakened demand for cement. Defendants and their co-conspirators successfully increased cement prices to supracompetitive levels in order to obtain the desired rate of return for the least efficient producers and an even higher rate of return for the more efficient companies. "This cost the consumer dearly." (LPC 3458)

Gus J. Chavalas of KAISER evidenced the continuing effect of Mundt's "educational campaign" and the collusive post-decontrol price increases in a December 3, 1975, speech to KAISER's Board of Directors:

> I'd like to take a few moments to look back at this year.
>
> In cement, the highlight for the sales and marketing division was the significant increase in our prices. Through October, mill nets are up $8.16 a ton over 1974 — an increase of 30%. In terms of dollars, our price increases exceeded our cost increases by approximately $6.5 million.
>
> According to all the textbooks this should not have happened. As a rule, in commodity products, depressed markets plus overcapacity equal price deterioration.
>
> Prices did soften throughout the United States this year, as they did in our markets — consequently,

> in order to put our finger in the dike we felt that it was a time for strong leadership — a role which also involved some risks.
>
> Generally, falling prices follow an insiduous path. They often start with an oral price-cut by one company to a few accounts, and then they spread. Usually, when the new, low level of price is met by all the manufacturers, the downward spiral starts again by a company hoping to secure more volume through pricing.
>
> We found ourselves in this situation in Texas where our mill nets started falling. We decided it was imperative to not only stop the downward trend, but more importantly, we wanted to turn it upward. The strategy we adopted was risky, but we felt strong action was necessary; otherwise, our prices would continue to slowly drop. Consequently, rather than just meet a $4.00 a ton price deviation that had been implemented in the market, we sent a letter to all customers stating three things:
>
> *First,* we met the $4.00 a ton price cut.
>
> *Second,* we further reduced our prices an additional $2.00 a ton for two months.
>
> *And Third,* we announced a price increase of $10.00 a ton to be effective in four months. Incidentally, we did not expect to get the full $10.00, but we wanted to start high.
>
> Our announcement went out in letter-form to insure that our position would be clear and not be eroded by any misunderstandings by customers. After our announcement, price-cutting activity began to slow down, and stabilized at our level. At the end of the two month period our competition went up $2.00

and also announced subsequent $5.00 a ton increases consistent with our date. We felt that we not only caused a bottoming-out of price deterioration at that time in Texas, but more importantly, we created an upward pricing atmosphere.

(KCG 527675-527679)

D. Adherence to the Delivered Pricing System, Product Uniformity and Uniform Terms and Conditions of Sale Also Further Defendants' Price-Fixing Efforts

Defendants above-described agreement was supported by a pervasive network of inter-connected activities each designed to promote uniformity of product and price and to suppress individual, unilateral decision-making conducive to true competition. Most defendants have admitted that they calculated prices to their customers on a delivered basis, including all delivery and freight charges, which was usually the lowest sum of mill base plus freight to a given location. Due to the importance of the freight component in prices and price stability, defendants agreed upon freight rates to be supported or opposed before the applicable regulatory authority, and then monitored one another's quoted prices to determine if the proper freight rates were used. Frequently, this resulted in direct contacts between defendants to ascertain the "correct" or "proper" price to be charged. (For a description of the evidence regarding these activities see Plaintiffs' Interrogatory Answer No. 5(b).)

A concise example of defendants' activities regarding joint rate-making is reflected in an August 19, 1970 memorandum from E. R. Rhodes to Hugh McBride, both of MONOLITH:

> The Southern California cement shippers and carriers have agreed on an increase in cement rates on

> shipments originating in the Southern territory on California intrastate cement movement.

(MPC 3185) At a series of meetings held in late 1970 representatives of the Southern California shippers, MONOLITH, CALIFORNIA PORTLAND, KAISER, AMCORD, SOUTHWESTERN and GENERAL, repeatedly discussed "Arizona and Nevada rates, mileages and prices", including four alternative methods of calculating a delivered piree, and finally agreed on a price for Nevada and Arizona sales. Rhodes stated in a December 14, 1970 memorandum:

> The Southern California cement companies all agree that the truck destination prices in Arizona and Nevada should be predicated on the interstate rates instead of the present method in which the CPUC rate scale determines.

(MPC 3201-3202)

Defendants also took concerted action to discourage customer pick-up and the proprietary hauling of cement. (See Plaintiffs' Interrogatory Answer No. 5(b)III.D.) Defendants acted jointly to prevent shippers from offering customers unloading allowances for night-time deliveries, which defendants viewed as a threat to uniform delivered prices. (See Plaintiffs' Interrogatory Answer No. 5(b)III.E.) Defendants even acted jointly to affect the charges for the portable storage bin that customers leased from cement shippers. (See Plaintiffs' Interrogatory Answer No. 5(b)III.F.)

Not only did defendants all agree to the simultaneous conversion from the barrel to the hundredweight unit of measure, more importantly, they invested significant time and energy in making sure that all prices would be rounded to the same decimal place. (See Plaintiffs' Inter-

rogatory Answers No. 5(b)III.G.) The amount of, and changes in, cash discounts were agreed upon (see Plaintiffs' Interrogatory Answer No. 7(b), as were the premiums used to compute the prices of specialty cements (see Plaintiffs' Interrogatory Answer No. 12(b)III.).

Market research data, including production capacities and predictions of demand, was exchanged through the PORTLAND CEMENT ASSOCIATION in order that defendants could act intelligently to bring supply and demand into balance and avoid over-capacity and price-cutting. (See Plaintiffs' Interrogatory Answer No. 11(b)III., VI. and VII.) The PORTLAND CEMENT ASSOCIATION also controlled much of the industry's technical research, held patents on products and production methods; and facilitated the exchange of technical information, all to the end that no defendant would produce a product that was superior to that of any other defendant, a condition that would inevitably lead to price variations. (See Plaintiffs' Interrogatory Answer No. 12(b).)

Thus, the cartel stabilized prices at a level sufficient that during the late 1960's and early 1970's, years which defendants characterize as having the "most virulent cost inflation in the nation's history", membership in the PORTLAND CEMENT ASSOCIATION (which had the highest dues of any trade association in the country) was at an all time high, and not one of its members, no matter how inefficient a producer, went out of business.

III.

LEGAL ISSUES RELATING TO DEFENDANTS' LIABILITY

If the jury believes that evidence plaintiffs will present at trial and the inferences plaintiffs will argue arise from that evidence, plaintiffs will have established that an agreement existed to raise and stabilize cement prices in all parts of the United States, which agreement constitutes a *per se* violation of the antitrust laws. Defendants have raised a single affirmative defense to plaintiffs' allegations — that the *Noerr-Pennington* doctrine exempts their 1971-1973 decontrol activities from the antitrust laws. This litigation, however, does not involve the petitioning of the government to take an anticompetitive action to undermine a competitor as was the case in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Rather, it involves an on-going price-fixing conspiracy independent of any governmental action, which was merely furthered, in part, through the achievement of price decontrol. The *Noerr-Pennington* doctrine has never been held to exempt joint rate or price-making activities from the antitrust laws. *United States v. Southern Motor Carriers Rate Conference, Inc.*, 672 F.2d 469 (5th Cir. 1982).

In addition, even if defendants' activities before the Price Commission and Cost of Living Council are technically covered by the *Noerr-Pennington* doctrine, there is evidence that defendants consciously misrepresented the need for industry-wide decontrol with exaggerated and misleading claims of an impending cement shortage. (See Plaintiffs' Interrogatory Answer No. 11(b).) The supplying of false and misleading information to a governmental agency voids whatever *Noerr-Pennington* protection might

otherwise attach. *Clipper Exzpress v. Rocky Mountain Motor Tariff Bureau,* 674 F.2d 1252 (9th Cir. 1982).

DATED this 7th day of September, 1983.

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By /s/ KENNETH R. REED
KENNETH R. REED
On behalf of all plaintiffs

Copies of the foregoing
mailed this 7th day of
September 1983 to:

The Honorable Manuel L. Real
Chief Judge
United States District Court
312 North Spring Street
Los Angeles, California 90012

APPENDIX E

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

NO. CIV. CIV 76-672

STATE OF ARIZONA,
Plaintiff,

vs.

PORTLAND CEMENT ASSOCIATION; AMCORD, INC., and its unincorporated divisions, PHOENIX CEMENT COMPANY and RIVERSIDE CEMENT COMPANY; CALIFORNIA PORTLAND CEMENT COMPANY and its unincorporated division ARIZONA PORTLAND CEMENT COMPANY; IDEAL BASIC INDUSTRIES, INC.; KAISER CEMENT & GYPSUM COMPANY; SOUTHWEST PORTLAND CEMENT COMPANY; ARIZONA ROCK PRODUCTS ASSOCIATION; ALLIED CONCRETE, INC.; ALLIED CONCRETE AND MATERIALS CO.; ARIZONA SAND & ROCK COMPANY, a subsidiary of CALIFORNIA PORTLAND CEMENT COMPANY; CHANDLER READY MIX, INC.; COLUMBIA BUILDING MATERIALS, INC.; JOHNSON & STEWART MATERIALS, INC.; PHOENIX SAND & ROCK, INC.; MESA SAND & ROCK, INC.; PHOENIX REDI-MIX COMPANY, INC.; NEW PUEBLO MATERIALS, INC.; THE TANNER COMPANIES and its unincorporated divisions UNITED METRO and TUCSON ROCK & SAND; TRI-CITY READY MIX, INC.; UNION ROCK & MATERIALS CORPORATION and its unincorporated divisions UNION ROCK & MATERIALS DIVISION and SAN XAVIER MATERIALS,

Defendants.

COMPLAINT DEMAND FOR JURY TRIAL

For its Complaint against the above-named defendants, Plaintiff the STATE OF ARIZONA, for itself and on behalf of the class hereinafter alleged and demanding a trial by jury, alleges as follows:

I

JURISDICTION AND VENUE

1. Counts One and three of this Complaint are filed under 28 U.S.C. § 1337, and sections 4 and 16 of the Act of Congress of October 15, 1914, 15 U.S.C. §§ 15 and 26 commonly known as the Clayton Act, to redress injuries sustained by the plaintiff and the class it represents as a result of the violations by the defendants as hereinafter alleged of section 1 of the Act of Congress of July 2, 1890, 15 U.S.C. § 1, commonly known as the Sherman Act, and for permanent injunctive relief from presently continuing and anticipated future violations by these defendants of section 1 of the Sherman Act, 15 U.S.C. § 1.

2. The claims for relief set forth in Counts One and Two and Counts Three and Four of this Complaint are derived from common nuclei of operative facts involving substantially identical issues of fact and law, such that the entire action constitutes a single case which could ordinarily be expected to be tried in one judicial proceeding as hereinafter more fully appears. For the interests of judicial economy, convenience and fairness, and in order to avoid unnecessary duplication and multiplicity of actions, this Court's jurisdiction over Count Two is pendant to this Court's jurisdiction over Count One and this Court's jurisdiction over Count Four is pendent to this Court's jurisdiction over Count Three.

3. Venue as to each defendant is laid in this judicial district pursuant to the provisions of section 12 of the

Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. §§ 1391(b), 1391(c). Each defendant maintains an office, transacts business, has an agent, or is found within the District of Arizona.

4. Each defendant is within the jurisdiction of this Court for the purpose of service of this Complaint.

5. The interstate trade and commerce described herein is carried on in part into, within and from the District of Arizona. Acts done pursuant to the combination and conspiracy have been performed in part within the District of Arizona. As appears more fully below, the acts complained of herein were within the flow of interstate trade and commerce and had a direct and substantial impact on that trade and commerce.

II.

PLAINTIFF

6. Plaintiff, the State of Arizona, brings this action on its own behalf and on behalf of the class hereinafter alleged.

7. Plaintiff State of Arizona and the members of the class hereinafter alleged, during the period covered by this Complaint, have purchased large amounts of cement, ready-mix concrete, grout, rock products and cement and concrete products including prestressed concrete, cement block and concrete pipe either directly form one or more of defendants or their co-conspirators or indirectly through contractors or distributors and have sustained damages as a result of the combinations and conspiracies and violations of the antitrust laws herein alleged.

III.

DEFENDANTS

8. PORTLAND CEMENT ASSOCIATION, an Illinois corporation (hereinafter "PCA") is made a defendant herein. PCA's principal place of business is Old Orchard Road, Skokie, Illinois. PCA is an association of business organizations engaged in the manufacture of portland cement within the United States, its territorial possessions and Canada. As of 1972, the membership of the PCA included 36 United States companies and 7 Canadian companies which accounted for more than 80 percent of the cement produced in these nations. Each of the defendants named in paragraphs 9 through 13 below is or has been a member of PCA.

9. AMCORD, INC., a Delaware corporation (hereinafter "Amcord") and its unincorporated divisions PHOENIX CEMENT COMPANY (hereinafter "Phoenix Cement") and RIVERSIDE CEMENT COMPANY (hereinafter "Riverside") are made defendants herein. Amcord's principal place of business is 610 Newport Center Drive, Newport Beach, California; Phoenix Cement's principal place of business is 3550 North Central Avenue, Phoenix, Arizona; and Riverside's principal place of business is 1500 Robidoux Boulevard, Riverside, California. Amcord is engaged primarily in the business of producing portland cement through its five operational manufacturing plants located in Crestmore and Oro Grande, California; Detroit, Michigan; Clarkdale, Arizona; and Stockertown, Pennsylvania. Phoenix Cement and Riverside are engaged in the business of producing portland cement at their manufacturing plants located at Clarkdale, Arizona, and Riverside, California, respectively. In 1974, Amcord's total sales of cement were approximately $100 million. In 1974, the total sales of

cement within the State of Arizona by Phoenix Cement were approximately $14 million. In 1974, the total sales of white cement within the State of Arizona by Riverside were approximately $600,000. Reference herein to Amcord shall be taken as referring to Amcord and any subsidiary corporation or division owned or controlled by Amcord, specifically including Phoenix Cement and Riverside.

10. CALIFORNIA PORTLAND CEMENT COMPANY, a California corporation (hereinafter "California Portland") and its unincorporated division ARIZONA PORTLAND CEMENT COMPANY (hereinafter "Arizona Portland") are made defendants herein. California Portland's principal place of business is 800 Wilshire Boulevard, Los Angeles, California; and Arizona Portland's principal place of business is Rillito, Arizona. California Portland is engaged primarily in the business of producing portland cement through its three operational manufacturing plants located in Colton and Mohave, California, and Rillito, Arizona. Arizona Portland is engaged in the business of producing portland cement at its manufacturing plant located at Rillito, Arizona. In 1974, California Portland's total sales of cement were approximately $60 million. In 1974, the total sales of cement within the State of Arizona by Arizona Portland were approximately $22 million. Reference herein to California Portland shall be taken as referring to California Portland and any subsidiary corporation or division owned or controlled by California Portland, specifically including Arizona Portland.

11. KAISER CEMENT & GYPSUM CORPORATION, a California corporation (hereinafter "Kaiser") is made a defendant herein. Kaiser's principal place of business is 300 Lakeside Drive, Oakland, California. Kai-

ser is engaged primarily in the business of producing portland cement through its five operational manufacturing plants located in Permanente and Lucerne Valley, California; San Antonio, Texas; Weianae, Hawaii; and Montana City, Montana. In 1974, Kaiser's total sales of cement were approximately $113 million. During the period of time covered by this complaint, Kaiser has sold cement within the State of Arizona. Reference herein to Kaiser shall be taken as referring to Kaiser and any subsidiary corporation or division owned or controlled by Kaiser.

12. IDEAL BASIC INDUSTRIES, INC., a Colorado corporation (hereinafter "Ideal") is made a defendant herein. Ideal's principal place of business is 950 Seventeenth Street, Denver, Colorado. Ideal is engaged primarily in the business of producing portland cement through its 14 operational manufacturing plants located in Ada, Oklahoma; Boetteher and Portland, Colorado; Castle Hayne, North Carolina; Devil's Slide, Utah; Houston, Texas (2 plants); Knoxville, Tennessee; Mobile, Alabama; Okay, Arkansas; Seattle, Washington; Superior, Nebraska; Tijeras, New Mexico; and Trident, Montana. In 1974, Ideal's total sales of cement were approximately $208 million. During the period of time covered by this complaint, Ideal has sold cement in the State of Arizona. Reference herein to Ideal shall be taken as referring to Ideal and any subsidiary corporation or division owned or controlled by Ideal.

13. SOUTHWESTERN PORTLAND CEMENT COMPANY, a Delaware corporation (hereinafter "Southwestern") is made a defendant herein. Southwestern's principal place of business is 1034 Wilshire Boulevard, Los Angeles, California. Southwestern is engaged primarily in the business of producing portland cement through

its five operational manufacturing plants located in Victorville, California; Fairburn, Ohio; and El Paso, Odessa and Amarillo, Texas. In 1974, Southwestern's total sales of cement were approximately $70 million. During the period of time covered by this complaint Southwestern has sold cement in the State of Arizona. Reference herein to Southwestern shall be taken as referring to Southwestern and any subsidiary corporation or division owned or controlled by Southwestern.

14. ARIZONA ROCK PRODUCTS ASSOCIATION, an Arizona corporation (hereinafter "ARPA") is made a defendant herein. ARPA's principal place of business is 3815 North Black Canyon Highway, Phoenix, Arizona. ARPA is an association of persons, firms and corporations engaged in the production of rock, sand, gravel, asphaltic concrete and ready-mix concrete in the State of Arizona. Each of the defendants named in paragraphs 15 through 17, 20 through 25 and 27 below is or has been a member of ARPA. Defendants Phoenix Cement and Arizona Portland are associate members of ARPA. Prior to 1973, ARPA was known as the Arizona Aggregate Association which was formed in 1957 and which grew out of the Central Arizona Concrete Association which was formed in 1951. Reference herein to ARPA shall be taken as referring to ARPA, the Arizona Aggregate Association and the Central Arizona Concrete Association.

15. ALLIED CONCRETE, INC., an Arizona corporation (hereinafter "Allied Concrete") is made a defendant herein. Allied Concrete's principal place of business is 11923 West Indian School Road, Phoenix, Arizona. Allied Concrete is primarily engaged in the business of producing ready-mix concrete, grout and mining rock products for sale.

16. ALLIED CONCRETE AND MATERIALS CO., an Arizona corporation (hereinafter "Allied Materials") is made a defendant herein. Allied Material's principal place of business is 2405 North Center Street, Mesa, Arizona. Allied Materials is primarily engaged in the business of producing ready-mix concrete, grout and mining rock products for sale.

17. ARIZONA SAND AND ROCK COMPANY, an Arizona corporation (hereinafter "AS&R") is made a defendant herein. AS&R's principal place of business is 1801 East University, Phoenix, Arizona. AS&R is primarily engaged in the business of producing ready-mix concrete, grout and mining rock products for sale. In 1960, California Portland acquired AS&R and Phoenix Concrete Co. which was then merged into AS&R and, since that date, AS&R has been a wholly-owned subsidiary of California Portland.

18. CHANDLER READY MIX, INC., an Arizona corporation (hereinafter "Chandler") is made a defendant herein. Chandler's principal place of business is 131 East Baseline Road, Mesa, Arizona. Chandler is primarily engaged in the business of producing ready-mix concrete, grout and mining rock products for sale.

19. COLUMBIA BUILDING MATERIALS, INC., an Arizona corporation (hereinafter "Columbia"), is made a defendant herein. Columbia's principal place of business is 446 East Jacinto Street, Tucson, Arizona. Columbia is primarily engaged in the business of producing ready-mix concrete, grout and mining rock products for sale.

20. JOHNSON & STEWART MATERIALS, INC., an Arizona corporation (hereinafter "J&S"), is made a defendant herein. J&S's principal place of business is 1901 North Alma School Road, Mesa, Arizona. J&S is primarily engaged in the business of producing ready-mix concrete, grout and mining rock products for sale.

21. PHOENIX SAND & ROCK, INC., an Arizona corporation (hereinafter PS&R) is made a defendant herein. PS&R's principal place of business is 117th Avenue and West Indian School Road, Phoenix, Arizona. PS&R is primarily engaged in the business of producing ready-mix concrete, grout and mining rock products for sale.

22. MESA SAND & ROCK, INC., an Arizona corporation (hereinafter "MS&R"), is made a defendant herein. MS&R's principal place of business is 2246 North Country Club Drive, Mesa, Arizona. MS&R is primarily engaged in the business of producing ready-mix concrete, grout and mining rock products for sale.

23. NEW PUEBLO MATERIALS, INC., an Arizona corporation (hereinafter "NPM"), is made a defendant herein. NPM's principal place of business is 4115 East Illinois, Tucson, Arizona. During the period of time covered by this complaint, NPM was primarily engaged in the business of producing ready-mix concrete, grout and mining rock products for sale.

24. PHOENIX REDI-MIX COMPANY, INC., an Arizona corporation (hereinafter "PRM"), is made a defendant herein. PRM's principal place of business is 3635 South 43d Avenue, Phoenix, Arizona. PRM is primarily engaged in the business of producing ready-mix concrete, grout and mining rock products for sale.

25. THE TANNER COMPANIES, an Arizona Corporation (hereinafter "Tanner") and its unincorporated divisions UNITED METRO and TUCSON ROCK & SAND are made defendants herein. Tanner's principal place of business is 2606 South 40th Street, Phoenix,

Arizona; United Metro's principal place of business is 2606 South 40th Street, Phoenix, Arizona; and Tucson Rock & Sand's principal place of business is 7400 East Speedway, Tucson, Arizona. United Metro and Tucson Rock & Sand are engaged in the business of producing ready-mix concrete, grout and mining rock products for sale. In 1972, United Metro acquired Tucson Rock & Sand. In 1966, the predecessor of Tanner acquired United Materials, Inc., and formed United Metro. United Materials, Inc., had in turn been formed in 1960 by the merger of Superior Sand & Gravel, Tempe Equipment Co., Avondale Sand & Rock and Coolidge Sand & Rock. Reference herein to Tanner shall be taken as referring to Tanner and any subsidiary corporation or division owned or controlled by Tanner specifically including United Metro and Tucson Rock & Sand. Defendant Amcord is a holder of preferred stock and long term securities in Tanner.

26. TRI-CITY READY MIX, INC., an Arizona corporation (hereinafter "Tri-City"), is made a defendant herein. Tri-City's principal place of business is 2128 East First Street, Tempe, Arizona. Tri-City is primarily engaged in the business of producing ready-mix concrete, grout and mining rock products for sale.

27. UNION ROCK & MATERIALS CORPORATION, an Arizona corporation (hereinafter "Union Rock") and its unincorporated divisions UNION ROCK & MATERIALS DIVISION (hereinafter "URM") and SAN XAVIER MATERIALS (hereinafter "San Xavier") are made defendants herein. URM's and San Xavier's principal places of business are 2800 South Central Avenue, Phoenix, Arizona, and 1000 West Valencia, Tucson, Arizona, respectively. URM and San Xavier are primarily engaged in the business of producing ready-mix concrete, grout and mining rock products for sale. Reference herein to

Union Rock shall be taken as referring to any subsidiary corporation or division owned or controlled by Union Rock, specifically including URM and San Xavier.

IV.

CO-CONSPIRATORS

28. Various individuals and companies not made defendants herein participated in the violations hereinafter alleged and performed acts and made statements in furtherance thereof.

V.

CLASS ACTION ALLEGATIONS

29. Pursuant to Rule 23(b)(3), Federal Rules of Civil Procedure, Plaintiff, the State of Arizona, seeks to represent the class of persons similarly situated. The class consists of all persons and entities within the State of Arizona which, during the applicable time period, built or caused to be built for their own account, whether for their own use, rental or sale, any structure or project of any kind or character involving the use of cement, ready- mix concrete, grout, rock products, and cement and concrete products including prestressed concrete, cement block and concrete pipe. The class includes but is not necessarily limited to the State of Arizona and all political subdivisions, school districts, municipalities, and governmental entities within the State of Arizona which have authorized the Attorney General of the State of Arizona to bring this action on their behalf pursuant to Ariz. Rev. Stat. Ann. § 41-192(A)(5) (1974).

30. Plaintiff is a member of said class; its claims are typical of the claims of all the class members; and it will fairly and adequately protect the interests of the class.

31. The class is so numerous that joinder of all members is impracticable. At a minimum, it consists of approximately 300 governmental entities within the State of Arizona.

32. Questions of law and fact common to the members of the class predominate over any questions affecting individual members. The common questions of fact include the existence of the conspiracy as alleged and the extent to which the members of the class were injured by the conspiracy alleged. The questions of law common to the members of the class include the legality of the conspiracy as alleged and the liability of defendants to class members for injury to their business or property interests.

33. The claims of plaintiff are identical to the claims of the other members of the class, and the defenses of each of the named defendants will be identical with respect to each and every member of the class.

34. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

VI.

DEFINITIONS

35. As used herein, "cement" means a binding agent which is comprised of limestone and clay or other ingredients such as lime, silica, iron oxide and alumina which is ground and kiln fired and combined with gypsum. There are two basic types of cement, grey and white.

36. As used herein, "freight allowance" means the credit or rebate paid by manufacturers of cement to purchasers who take delivery of cement at mills or distribution terminals.

37. As used herein, "ready-mix concrete" means a mixture of cement and other materials such as sand, stone and water and at times, additives, which mixture is used in the construction and improvement of various types of structures and their appurtenances.

38. As used herein, "ready-mix supplier" means a person who is engaged in the business of producing and selling ready-mix concrete.

VII.

TRADE AND COMMERCE

39. The manufacture and sale of cement is a substantial industry in the United States. In 1974, there were approximately 175 operational cement manufacturing plants in this country. Domestic shipments of portland cement in 1974 amounted to approximately 79.5 million short tons valued at approximately $2.1 billion.

40. The defendants named in paragraphs 9 through 13 above are engaged in the business of producing portland cement for sale. During the period of time covered by this Complaint, these defendants manufactured and/or purchased cement from sources outside the state of Arizona for sale within the State of Arizona and/or manufactured cement within the State of Arizona for sale outside the State of Arizona. During that period, there was a substantial and continuous flow in interstate trade and commerce of cement manufactured by these defendants.

41. The production and sale of cement is highly concentrated. During the period of time covered by this Complaint, the defendants named in paragraphs 9 through 13 above accounted for virtually all of the sales of cement within the State of Arizona and defendants Amcord and California Portland alone accounted for more than 95 per cent of the sales of cement within the State of Arizona.

42. Cement is sold in bulk and in sacks. Bulk cement is sold either at a mill or distribution terminal for transportation by the customer or is delivered by common carrier to the customer's location. Sack cement is sold only through delivery by common carrier to the customer's location.

43. Cement is sold primarily to four categories of customers: (a) ready-mix suppliers which account for approximately 73 percent of cement sold and which use cement in the preparation of ready-mix concrete and grout for sale; (b) concrete product companies which account for approximately 10 percent of cement sold and which use cement in the manufacture of products containing cement such as prestressed concrete, cement block and concrete pipe all for sale; (c) contractors which account for approximately 7 percent of cement sold and which use cement in the preparation of ready-mix concrete for sale; and (d) building material dealers which account for approximately 7 per cent of cement sold and which purchase sack cement for resale. Miscellaneous categories of purchasers account for approximately 3 percent of cement sold. Some purchasers of cement may fall into two or more of these categories of purchasers.

44. The purchasers of cement in each of the four categories described in the preceeding paragraph pass on

to their customers the full prices of and all increases in the price of cement.

45. The defendants named in paragraphs 15 through 27 above are engaged in the production of ready-mix concrete, grout and the mining of rock products and the sale of such ready-mix concrete, grout and rock products. During the period of time covered by this Complaint, these defendants purchased ingredients for the production of ready-mix concrete and grout from sources outside the State of Arizona. During that period, at least some of these defendants manufactured ready-mix concrete and grout and mined rock products within the State of Arizona for sale outside the State of Arizona. During that period, there was a substantial and continuous flow in interstate trade and commerce of ready-mix concrete and grout produced and rock products mined by these defendants.

46. Ready-mix concrete, grout and rock products are sold to contractors for resale and directly to governmental entities, owners of homes and buildings and others for their own use. Contractors which purchase ready-mix concrete, grout and rock products pass on to their customers the full prices of and all increases in the prices of ready-mix concrete, grout and rock products.

47. In 1974, the value of contract constructions awards in Arizona amounted to approximately $1.4 billion, a substantial portion of which was attributable to the cost of cement, ready-mix concrete, grout, rock products and cement and concrete products including prestressed concrete, cement block and concrete pipe. Such construction is usually financed through funds which flow in interstate commerce. The acts complained of herein have direct and substantial impact on the flow of such funds in interstate commerce.

COUNT ONE

48. Paragraphs 1, 3 through 13, and 28 through 47 above are incorporated herein by this reference.

VI.

VIOLATIONS ALLEGED

49. Beginning at a time unknown to plaintiff but believed to be during or before 1958 and continuing until the filing of this complaint, defendants PCA, Amcord, California Portland, Kaiser, Ideal, and Southwestern engaged in a continuing combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce within the State of Arizona in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. Said combination and conspiracy may continue or reoccur unless the relief hereinafter prayed for is granted.

50. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among the above-named defendants and their co-conspirators to fix, maintain and stabilize prices for cement the substantial terms of which have been and are as follows:

(a) to reduce and eliminate competition in the sale of cement;

(b) to increase the prices for which cement is sold and the return on invested capital in connection with the manufacture and sale of cement;

(c) to establish uniform and agreed-upon mill prices for cement;

(d) to establish and maintain a system of pricing for cement resulting in uniform and agreed-upon delivered prices for cement;

(e) to establish agreed-upon freight allowances;

(f) to establish uniform and agreed-upon credit terms in connection with the sale of cement;

(g) to allocate customers and territories for the sale of cement;

(h) to restrict the territories within which and the purposes for which purchasers of cement could utilize the cement they purchased; and

(i) to establish agreed-upon categories of customers to whom cement would be sold.

VII.

EFFECTS

51. The aforesaid combination and conspiracy had the following effects, among others:

(a) the price of cement was maintained and stabilized at artificial and non-competitive levels;

(b) competition in the sale of cement between the above-named defendants and their co-conspirators was restricted, suppressed and restrained;

(c) purchasers of cement and of products containing cement including, but not limited to, ready-mix concrete, grout, prestressed concrete, cement block, and concrete pipe were deprived of the benefits of free and open competition among the above-named defendants and their co-conspirators; and

(d) the prices paid by plaintiff and the class it represents for cement and products containing cement including, but not limited to, ready-mix concrete, grout, prestressed concrete, cement block, and concrete pipe were higher than they would otherwise have been.

VIII.

FRAUDULENT CONCEALMENT

52. At all times relevant hereto, plaintiff had no knowledge of the existence of its causes of action based upon defendants' combination and conspiracy or of any fact which might have lead to the discovery thereof. Plaintiff did not and could not discover the violations complained of nor learn of its causes of action at an earlier date by the exercise of due diligence because the defendants and others, and officers, directors and employees of the defendants and others, actively, successfully, and fraudently concealed their violations by use of elaborate schemes, artifices of fraud, secrecy, duress and coercion to avoid detection.

COUNT TWO

53. Plaintiff incorporates by reference paragraphs 1 through 13 and 28 through 52 above.

54. The continous agreement, combination conspiracy and concert of action in unreasonable restraint of the aforesaid trade and commerce is in violation of Ariz. Rev. Stat. Ann. § 44-1402, commonly known as the Uniform State Antitrust Act.

COUNT THREE

55. Paragraphs 1, 3, through 7, 10 and 14 through 47 above are incorporated herein by this reference.

IX.

VIOLATIONS ALLEGED

56. Beginning at a time unknown to plaintiff but believed to be during or before 1951 and continuing until the filing of this complaint, defendants named in paragraphs 10 and 14 through 27 above engaged in a continuing combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce within the State of Arizona in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. Said combination and conspiracy may continue or reoccur unles the relief hereinafter prayed for is granted.

57. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among the defendants named in paragraphs 10 and 14 through 27 above and their coconspirators to fix, maintain and stabilize prices for ready-mix concrete, grout and rock products the substantial terms of which have been and are as follows:

(a) to reduce and eliminate competition in the sale of ready-mix concrete, grout and rock products;

(b) to establish uniform and agreed-upon prices for ready-mix concrete, grout and rock products;

(c) to exchange information concerning the prices, terms and conditions of sale of ready-mix concrete, grout and rock products;

(d) to reduce and eliminate discounts and deviations from list prices for ready-mix concrete, grout and rock products; and

(e) to establish uniform and agreed-upon credit terms and prompt payment discounts in connection with the sale of ready-mix concrete, grout and rock products;

X.

EFFECTS

58. The aforesaid combination and conspiracy had the following effects, among others:

(a) the prices of ready-mix concrete, grout and rock products were maintained and stabilized at artificial and non-competitive levels;

(b) competition in the sale of ready-mix concrete, grout and rock products between the defendants named in paragraphs 15 through 27 above and their co-conspirators was restricted, suppressed and restrained;

(c) purchasers of ready-mix concrete, grout and rock products were deprived of free and open competition; and

(d) the prices paid by plaintiff and the class it represents for ready-mix concrete, grout and rock products were higher than they would otherwise have been.

XI.

FRAUDULENT CONCEALMENT

59. At all times relevant hereto, plaintiff had no knowledge of the existence of its causes of action based upon defendants' combination and conspiracy or of any fact which might have lead to the discovery thereof. Plaintiff did not and could not discover the violations complained of nor learn of its causes of action at an earlier date by the exercise of due diligence because the defendants and others, and officers, directors, and employees of the defendants and others, actively, successfully, and fraudulently concealed their violations by use of elaborate schemes, artifices of fraud, secrecy, duress and coercion to avoid detection.

COUNT FOUR

60. Paragraphs 1 through 7, 10, 14 through 47 and 55 through 59 above are incorporated herein by this reference.

61. The continuous agreement, combination, conspiracy and concert of action in unreasonable restraint of the aforesaid trade and commerce is in violation of Ariz. Rev. Stat. Ann. § 44-1402, commonly known as the Uniform State Antitrust Act.

XII.

PRAYER

WHEREFORE, plaintiff prays:

1. That the Court determine, pursuant to Rule 23, Federal Rules of Civil Procedure, that this action is a proper class action and that the State of Arizona, by and through its Attorney General, is a proper class represen-

tative, and that the Court order that the best practicable notice of this action be given to each and every member of the class represented by the State of Arizona in this action.

2. That the court adjudge and decree that the defendants and co-conspirators have engaged in unlawful combinations and conspiracies in restraint of the aforesaid trade and commerce in violation of 15 U.S.C. § 1 and Ariz. Rev. Stat. Ann. § 44-1402.

3. That the defendants, and each of them, be ordered to pay to Plaintiff and to each member of the class described above an amount equal to the damages sustained by each as a result of the aforesaid violations, trebled, in accordance with section 4 of the Clayton Act, 15 U.S.C. § 15, and Ariz. Rev. Stat. Ann. § 44-1408.

4. That the defendants, their officers, directors, agents, and employees and those persons in active concert or participation with any of them be enjoined and restrained from, in any manner, directly or indirectly, continuing, maintaining, or renewing the combination and conspiracy hereinbefore alleged, or from engaging in any other combination, conspiracy, contract, agreement, understanding or concert of action having a similar purpose or effect, and from adopting or following any practice, plan, program, or device having a similar purpose or effect.

5. That plaintiff be awarded its costs of suit and a reasonable attorney's fee as required by section 4 of the Clayton Act and Ariz. Rev. Stat. Ann. § 44-1408.

6. That plaintiff have such other, further and different relief as the Court may deem just and proper in the premises.

BRUCE E. BABBITT
The Attorney General

ANTHONY B. CHING
Chief Counsel
Economic Protection Division

/s/ KENNETH R. REED
KENNETH R. REED
Director, Antitrust Section
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159 State Capitol Building
Phoenix, Arizona 85007

Attorneys for the State of Arizona

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury.

BRUCE E. BABBITT
The Attorney General

ANTHONY B. CHING
Chief Counsel
Economic Protection Division

/s/ KENNETH R. REED
KENNETH R. REED
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APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

MDL NO. 296
MASTER FILE NO. CIV-76-488A-PHX-DAM
FILE NO. 79-620-PHX-CAM
CLASS ACTION
JURY TRIAL DEMANDED

STATE OF ALABAMA, on its own behalf and on behalf of its public entities and political subdivisions, similarly situated,

Plaintiffs,

vs.

PORTLAND CEMENT ASSOCIATION, a corporation; ALPHA PORTLAND INDUSTRIES, INC., a corporation; CITADEL CEMENT CORPORATION, a Maryland corporation; CITADEL CEMENT CORPORATION, a joint venture incorporated in New Jersey; DUNDEE CEMENT COMPANY, a corporation; GENERAL PORTLAND, INC., a corporation; IDEAL BASIC INDUSTRIES, INC., a corporation; LONE STAR INDUSTRIES, INC., a corporation, MARQUETTE COMPANY, a corporation; MARTIN-MARIETTA CORPORATION, a corporation; MEDUSA CORPORATION, a corporation; MISSOURI PORTLAND CEMENT COMPANY, a corporation; NATIONAL CEMENT COMPANY, INC., a corporation; PENN-DIXIE INDUSTRIES, INC., a corporation; SANTEE PORTLAND CEMENT CORPORATION, a corporation; UNITED STATES STEEL CORPORATION, a corporation;

Defendants,

AMENDED COMPLAINT

Plaintiff, State of Alabama, by its Attorney General, on its own behalf and as a representative of the claim

hereinafter defined brings this class action for treble damages, penalties, and injunctive relief under the anti-trust laws of the United States, and of the State of Alabama, demanding a trial by jury, and alleging as follows:

I.

JURISDICTION AND VENUE

1. This Complaint is filed and these proceedings are instituted and the jurisdiction of this Court in invoked under the authority of the provisions of § 1337 of the Judicial Code, 28 U.S.C. § 1337 and §§ 4 and 16 of the Act of Congress of October 15, 1914, 15 U.S.C. §§ 15 and 26, commonly known as the Clayton Act, to recover treble damages and penalties and to obtain injunctive relief and costs of suit, including reasonable attorneys' fees, for injuries sustained by plaintiff and members of the class by reason of defendants' violations of section 1 of the Sherman Act, 15 U.S.C. § 1, and violations of the *Code of Alabama of 1975* § 6-5-60.

2. The claims for relief set forth in Counts 1 and 2 of this Complaint are derived from a common nucleus of operative facts and involve substantially identical issues of law and fact. The entire action would ordinarily be expected to be tried in a single judicial proceedings because the entire action constitutes one case. In the interest of convenience, fairness and judicial economy, and to avoid unnecessary duplication and a multiplicity of actions, this Court's jurisdiction over Count 2 is pendent to this Court's jurisdiction over Count 1.

3. All defendants are found or transact business within the State of Alabama, Also, each defendant named in this Complaint is found within the Middle District of

Alabama, or transacts business within the Middle District of Alabama or venue is otherwise proper as to each defendant because the conduct, conspiracy, agreement and combination herein alleged was and is being carried on, in part, in said District. In addition, the interstate trade and commerce described herein is carried on, in part, within said District.

4. Each defendant is within the jurisdiction of this Court for the purpose of service of this Complaint.

II.

INTERSTATE COMMERCE AFFECTED

5. The trade and commerce which is the subject matter of this litigation and which is hereinafter described, and the acts alleged herein, are a part of interstate commerce and are carried on, in part, within, into and from the Middle District of Alabama. Also, as hereinafter described, the acts and violations complained of were within the flow of interstate trade and commerce and had a direct and substantial impact on interstate trade and commerce.

III.

DEFINITIONS

6. As used in this Complaint:

(a) "Cement" means a binding agent comprised of limestone and clay or other ingredients such as lime, silica, iron oxide and alumina, which is ground, kiln-fired, and combined with gypsum;

(b) "Concrete" means a mixture of cement and other materials such as sand, stone and water and at

times, additives, which hardens from its initial pulpy consistency into a stonelike mass;

(c) "Freight allowance" means the credit or rebate paid by producers of cement to purchasers who take delivery of cement at mills or distribution terminals;

(d) "Freight absorption" means the amount of freight charges paid by producers of cement in order to make delivered sales of cement at the price determined under defendants' pricing formula;

(e) "Premium" means the amount in excess of the price of Type 1 Portland Cement for which other grades and types of cement are sold;

(f) "Ready-mix concrete" means a mixture of cement and other materials such as sand, stone and water, and, at times, additives, which mixture is used in the construction and improvement of roads, structures and various other projects.

IV.

PLAINTIFF

7. Plaintiff, the State of Alabama, brings this action on its own behalf and on behalf of the class hereinafter alleged. Plaintiff, through its agencies, departments, schools, state colleges and universities, public hospitals and mental health institutions, political subdivisions and public entities, and members of the class hereinafter alleged, have purchased large quantities of cement and cement products, including ready-mix concrete, grout, prestressed concrete, cement block and concrete pipe during the period covered by this Complaint. Plaintiff and members of the class hereinafter alleged have built or

caused to be built, structures and projects constructed, in whole or in part, with cement and/or cement products, including prestressed concrete, cement block, concrete pipe and other materials comprised of cement during the period covered by this Complaint. Purchases have been made from one of defendants or their co-conspirators, or from defendants or co-conspirators through non-conspirator contractors or distributors, and plaintiff and members of the class hereinafter alleged, have sustained damages as a result of the combinations and conspiracies in violation of the antitrust laws hereinafter alleged.

V.

DEFENDANTS

8. Portland Cement Association ("PCA") is a corporation organized under the laws of Illinois with its principal place of business at 5420 Old Orchard Road, Skokie, Illinois. PCA is a trade association of business organizations engaged in the production of Portland cement within the United States, its territories, and Canada. As of 1979, its membership included forty-six (46) United States and Canadian companies which accounted for more than eighty (80%) percent of the cement produced in these nations.

9. Defendants named below (collectively the "Producers") are corporations engaged, directly or through subsidiaries or divisions, in the production, distribution and sale of cement. Each is, or has been, a member of the PCA. Each has sold cement in the State of Alabama. Each corporation named is organized under the laws of the

state and has its principal place of business in the city indicated in the following table:

COMPANY	STATE OF INCORPORATION	PRINCIPAL PLACE OF BUSINESS
Alpha Portland Industries, Inc.	New Jersey	Easton, Pennsylvania
Citadel Cement Corporation, a Maryland corporation	Maryland	Atlanta, Georgia
Citadel Cement Corporation, a joint venture incorporated in New Jersey	New Jersey	Atlanta, Georgia
Dundee Cement Company	Delaware	Dundee, Michigan
General Portland, Inc.	Delaware	Dallas, Texas
Ideal Basic Industries, Inc.	Colorado	Denver, Colorado
Lone Star Industries, Ine.	Delaware	Greenwich, Connecticut
Marquette Company	Delaware	Nashville, Tennessee
Martin-Marietta Corporation	Maryland	Bethesda, Maryland
Medusa Corporation	Ohio	Cleveland, Ohio
Missouri Portland Cement Company	Delaware	St. Louis, Missouri

COMPANY	STATE OF INCORPORATION	PRINCIPAL PLACE OF BUSINESS
National Cement Company, Inc.	Alabama	Birmingham, Alabama
Penn-Dixie Industries, Inc.	Delaware	New York, New York
Santee Portland Cement Corporation	South Carolina	Holly Hill, South Carolina
United States Steel Corporation	Delaware	Pittsburgh, Pennsylvania

VI.

CO-CONSPIRATORS

10. Various other individuals, corporations and other entities not made defendants in this Complaint participated as co-conspirators in the violations alleged herein and performed acts and made statements in furtherance thereof.

VII.

TRADE AND COMMERCE

11. The production and sale of cement is a substantial industry in the United States. During 1977, there were approximately 169 operational cement manufacturing plants in the United States and its territories. In 1977, the apparent annual clinker production capacity was 92.6 million tons. Based upon the specifications for Types I and II Portland cement, the cement industry in the United States and Puerto Rico had an annual grinding capacity of more than 100 million tons in 1977. The domestic cement industry provided approximately 76.3 million tons of Portland cement in 1977. In 1977, domestic cement producers shipped 78.0 million tons of Portland cement, including 0.9 million tons of imported cement, valued at approximately $2.8 billion. Throughout the period of time covered by this Complaint, there was a substantial and continuous flow of cement in interstate trade and commerce.

12. The production, distribution and sale of cement by defendants constitutes trade and commerce among the several states within the meaning of section 1 of the Sherman Act. 15 U.S.C. § 1. During the period of time covered by this Complaint, the defendants named in paragraph 9 manufactured cement for sale inside and outside the state of manufacture in a substantial and continuous flow in interstate commerce. The conspiracy alleged herein restrained the trade and commerce in cement in and among the several states.

13. During the period covered by this Complaint, defendants and their co-conspirators produced, marketed, transported, bought and sold substantial quantities of cement which moved in constant and uninterrupted flow in interstate commerce throughout the United States and, in part, within the Middle District of Alabama.

14. The volume of sales of cement to the State of Alabama and the class members alleged herein by defendants and their co-conspirators during the period of this Complaint, while specifically unknown to plaintiff, is substantial.

VIII.

CLASS ACTION ALLEGATIONS

15. Pursuant to Rule 23(b)(3), Federal Rules of Civil Procedure, plaintiff seeks to represent the class of all

Alabama governmental entities, excluding agencies of the United States government, which purchased cement and cement products during the period covered by this Complaint and which has sustained damages thereby as a result of the violations herein alleged. The class includes the State of Alabama, its public agencies and departments; political subdivisions, including counties, cities and municipalities; state universities, state colleges, school boards and districts; state, county and city hospitals and mental health institutions; and other governmental entities within the State of Alabama, excluding agencies of the United States government.

16. (a) The class is so numerous that joinder of all class members is impracticable. The members of the class of plaintiffs number approximately 900.

(b) Questions of law and fact common to the members of the class predominate over any questions affecting individual members. Except as to the amount of damages and the threatened damages or injuries which each member of the class has or will have sustained, all other questions of fact and law are common to the class, including without limitation: the existence of the combination, conspiracy, and continuing course of conduct alleged, the violation of section 1 of the Sherman Act, 13 U.S.C. § 1, the violation of *Code of Alabama 1975* § 6-5-60.

(c) Plaintiff is a member of the class. Plaintiff's claims are typical of the claims of the class members. The representative of the class will fairly and adequately protect the interests of the class. The interests of the representative are coincident with and not antagonistic to those of the class.

(d) The questions of law and fact common to the members of the class predominate over any questions

affecting only individual members of the class, and a class action is superior to other available methods for the fair and efficient adjudication of this action. To the class representative's knowledge, there is no interest by members of the class in individually controlling the prosecution of separate actions; no litigation concerning the subject matter of this Complaint has been commenced by the members of the class; and it is desirable to concentrate litigation of all claims made herein in a class action in order to provide small claimants with a forum to seek redress for this antitrust violation, and avoid the risk of inconsistent or varying adjudications on the questions of law and fact common to the class. All of the class members are readily identifiable by plaintiff and no substantial difficulties are likely to be encountered in the management of the class action.

IX.

FRAUDULENT CONCEALMENT

17. Plaintiff had no knowledge of the antitrust violation alleged herein, or of any facts which might reasonable have led to the discovery thereof until the filing of the civil complaint in *State of Arizona v. Portland Cement Association, et. al.,* Civil Action No. C76-672 PHX CAM (D. Ariz.). Plaintiff did not and could not have discovered these violations at any earlier date by the exercise of due diligence because the defendants and their co-conspirators and officers, directors and employees of the defendants and their co-conspirators, actively, successfully and fraudulently concealed their violations by use of fraud and secrecy to avoid detection.

X.

VIOLATIONS ALLEGED

COUNT ONE

18. Beginning at a date unknown to plaintiff, but believed to be during or before 1968, and continuing to the present time, defendants and their co-conspirators have engaged in a continuous combination and conspiracy in unreasonable restraint of trade and commerce in cement, in violation of section 1 of the Sherman Act, 13 U.S.C. § 1. Said combination and conspiracy may continue or reoccur unless the relief hereinafter prayed for is granted.

19. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and consist of action among the defendants and their co-conspirators to fix, maintain and stabilize the prices for cement, the substantial terms of which have been and are:

(a) to reduce and eliminate competition in the sale of cement;

(b) to establish, maintain and follow a uniform and agree-upon formula by which the delivered price quoted for cement is the lowest sum of mill price plus the freight of the destination where the cement is to be used, resulting in uniform and agree-upon delivered prices for cement;

(c) to establish, maintain and utilize agreed-upon freight allowances and freight absorption in connection with the sale of cement;

(d) to fix, stabilize and maintain mill prices for the sale of cement;

(e) to increase mill prices for the sale of cement in uniform and agreed-upon amounts;

(f) to create an artificial and contrived shortage in the production and sale of cement;

(g) to allocate customers and territories for the sale of cement; and

(h) to establish, maintain and utilize agreed-upon credit terms and other terms and conditions for the sale of cement.

XI.

COUNT TWO

20. Beginning at a date unknown to plaintiff, but believed to be during or before 1968, and continuing to the present time, defendants and their agents, officers, attorneys and co-conspirators created, operated, aided abetted or have engaged in an unlawful trust, combine, monopoly or conspiracy in unreasonable constraint of trade and commerce in cement in violation of *Code of Alabama* 1975 § 6-5-60.

21. Allegations contained in paragraph 19 of this Complaint are here re-alleged with the many force and effect as if alleged in full.

22. The unlawful trust, combine or monopoly alleged herein, or its affects, directly or indirectly, compelled plaintiff, its agencies, departments, schools, state colleges and universities, public hospitals and mental health institutions, cities, municipalities, political subdivisions and other members of the class alleged to pay substantially higher prices for cement than would have been the case but for the unlawful conduct complained of herein, and plaintiff, its public entities and political subdivisions and class members as alleged herein have been injured and

financially damaged by defendants in an amount which is presently undetermined.

XII.

EFFECTS

23. The aforesaid conduct, allowed in Counts One and Two, in violation of the antitrust laws of the United States and of the State of Alabama, by defendants and their co-conspirators has had the following effects, among others:

(a) the price of cement was established, stabilized and maintained at artificially high levels;

(b) competition in the distribution and sale of cement between defendants and their co-conspirators has been restricted, suppressed, and restrained;

(c) purchasers of cement and cement products were deprived of free and open competition in the sale of said products; and

(d) prices paid by plaintiff and class members for cement and cement products were higher than they would have been but for the aforesaid violations.

XIII.

INJURY

24. During the period of the antitrust violations by defendants and their co-conspirators, plaintiff and members of the class have purchased cement and cement products and, by reason of these offenses herein alleged, have been injured in their business and property by having been charged and having paid substantially higher prices for cement and cement products than they would

have paid in the absence of such violations. The amount of damages sustained by plaintiff and members of its class cannot be ascertained until discovery is concluded.

25. Plaintiff and other members of its class are threatened with further loss and damage unless defendants' antitrust violatons are enjoined.

PRAYER

WHEREFORE, Plaintiff:

1. Prays that the Court determine as soon as practicable that this action is to be maintained as a class action on behalf of the class herebefore alleged;

2. With respect to Count One, prays that the Court adjudge that, as alleged therein, the defendants have engaged in unlawful combinations and conspiracies in restraint of the aforesaid trade and commerce in cement in violation of section 1 of the Sherman Act. 15 U.S.C. §1;

3. With respect to Count One, demands judgment against defendants for treble the damages suffered by plaintiff and all members of the class described above due to defendants' violation of the antitrust laws as provided for in section 4 of the Clayton Act, 15 U.S.C. §15, together with such interest thereon as is permitted by law;

4. With respect to Count Two, prays that the Court adjudge that, as alleged therein, defendants have engaged in an unlawful trust, combine or monopoly in violation of *Code of Alabama 1975* §6-5-60;

5. With respect to Count Two, demand judgment against defendants for the sum of Five Hundred ($500) Dollars for each instance of injury or damage and all actual damages suffered by plaintiff and all members of the class described above, due to each of defendants'

violations of *Code of Alabama 1975* § 6-5-60, or due to the effects of such violations, or demands some lesser amount reduced to the extent plaintiff has recovery under Count One, together with such interest thereupon as is permitted by law;

6. Prays that each defendant, its successors, assignees, subsidiaries and transferees, and respective officers, directors, agents and employees thereof, and those persons in active concert or participation with any of them be enjoined and restrained from, in any manner, directly or indirectly, continuing, maintaining or renewing the combination and conspiracy hereinbefore alleged, or from engaging in any other combination, conspiracy, contract, agreement, understanding or concert of action having a similar purpose or effect, and from adopting or following any practice, plan, program, or devices having a similar purpose or effect; and

7. Prays that plaintiff recover the costs of this suit, including reasonable attorneys' fees; and

8. Prays that plaintiff have such other, further and different relief as the Court may deem just and proper.

Respectfully submitted,

/s/ CHARLES A. GRADDICK

CHARLES A. GRADDICK
Attorney General

/s/ SUSAN BETH FARMER

SUSAN BETH FARMER
Assistant Attorney General

/s/ JAMES DRURY FLOWERS

JAMES DRURY FLOWERS
Assistant Attorney General

ADDRESS OF COUNSEL:

250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130

JURY DEMAND

Please take notice that plaintiff demands a trial by jury pursuant to Rule 38(b), Federal Rules of Civil Procedure, of all issues triable of right by a jury.

CHARLES A. GRADDICK
Attorney General
By —

/s/ SUSAN BETH FARMER

SUSAN BETH FARMER
Assistant Attorney General

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was mailed postage prepaid this 16th day of April, 1980, to counsel appearing on the following service lists:

Exhibit "A"	dated 2/1/80
Exhibit "B"	dated 7/6/79
Exhibit "C"	dated 3/12/80
Exhibit "D"	dated 3/31/80
Exhibit "E"	dated 12/20/77
Exhibit "F"	dated 2/29/80

and that a copy of the amended complaint, a summons, and a copy of pretrial order No. 40 was mailed to:

Deputy Clerk
U. S. District Court
District of Arizona
Federal Building
230 N. First Avenue
Phoenix, Arizona 85003

this 16th day of April, 1980, for service upon Citadel Cement Corporation, a joint venture incorporated in New Jersey, and Citadel Cement Corporation, a Maryland corporation.

/s/ SUSAN BETH FARMER
SUSAN BETH FARMER
Assistant Attorney General

APPENDIX G

EVELLE J. YOUNGER, Attorney General
WARREN J. ABBOTT, Assistant Attorney General
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Telephone: (213) 736-2036

Attorneys for Plaintiff
the State of California

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL ACTION NO. 78-4373

THE STATE OF CALIFORNIA, on behalf of itself and all other political subdivisions, public agencies and districts of the State of California similarly situated,
Plaintiffs,

v.

PORTLAND CEMENT ASSOCIATION, ANCORD, INC., and its unincorporated division RIVERSIDE CEMENT; CALIFORNIA PORTLAND CEMENT CO.; KAISER CEMENT AND GYPSUM CORP.; SOUTHWESTERN PORTLAND CEMENT CO.; GENERAL PORTLAND CEMENT CO.; LONE STAR INDUSTRIES, INC.; THE FLINTKOTE CO.; MONOLITH PORTLAND CEMENT CO., IDEAL BASIC INDUSTRIES, INC.,
Defendants.

CLASS ACTION COMPLAINT FOR TRIPLE DAMAGES UNDER THE ANTI-TRUST LAWS

(Jury Demanded)

COMPLAINT

For its Complaint against the above-named defendants, Plaintiff the STATE OF CALIFORNIA, for itself and on behalf of the class hereinafter alleged and demanding a trial by jury, alleges as follows:

I

JURISDICTION AND VENUE

1. Plaintiff, the State of California files this Complaint under 28 U.S.C. § 1337, and sections 4 and 16 of the Act of Congress of October 15, 1914, 15 U.S.C. §§ 15 and 26 commonly known as the Clayton Act, to redress injuries sustained by the plaintiff and the class it represents as a result of the violations by the defendants as hereinafter alleged of section 1 of the Act of Congress of July 2, 1890, 15 U.S.C. § 1, commonly known as the Sherman Act, and for permanent injunctive relief from presently continuing and anticipated future violations by these defendants of section 1 of the Sherman Act, 15 U.S.C. § 1.

2. The claims for relief set forth in Counts One, Two and Three of this Complaint are derived from common nuclei of operative facts involving substantially identical issues of fact and law, such that the entire action constitutes a single case which would ordinarily be expected to be tried in one judicial proceeding as hereinafter more fully appears. For the interests of judicial economy, convenience and fairness, and in order to avoid unnecessary duplication and multiplicity of actions, this Court's jurisdiction over Counts Two and Three is pendent to this Court's jurisdiction over Count One.

3. Venue as to each defendant is laid in this judicial district pursuant to the provisions of section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. § 1391(c).

Each defendant maintains an office, transacts business, is licensed to do business, has an agent, or is found within the Central District of California.

4. Each defendant is within the jurisdiction of this Court for the purpose of service of this Complaint.

5. The interstate trade and commerce described herein is carried on in part into, within and from the Central District of California. Acts done pursuant to the combination and conspiracy have been performed in part within the Central District of California. As appears more fully below, the acts complained of herein were within the flow of interstate trade and commerce and had a direct and substantial impact on that trade and commerce.

II

PLAINTIFF

6. Plaintiff, the State of California brings this action on its own behalf and on behalf of the class hereinafter alleged.

7. Plaintiff State of California and the members of the class hereinafter alleged, during the period covered by this Complaint, have purchased large amounts of cement, and cement and concrete products including prestressed concrete, cement block and concrete pipe either directly from one or more of defendants or their co-conspirators or indirectly through contractors or distributors and have substained demages as a result of the combinations and conspiracies and violations of the antitrust laws herein alleged.

III

DEFENDANTS

8. PORTLAND CEMENT ASSOCIATION, an Illinois corporation (hereinafter "PCA") is made a defendant herein. PCA's principal place of business is Skokie Illinois. PCA is an association of business organizations engaged in the manufacture of portland cement within the United States, Puerto Rico, its territorial possessions and Canada. As of 1974, the membership of the PCA included 41 United States companies and 9 Canadian companies which accounted for more than 80 percent of the cement produced in these nations. Each of the defendants named in paragraphs 9 through 17 below is or has been a member of PCA.

9. AMCORD, INC., a Delaware corporation (hereinafter "Amcord") and its unincorporated division RIVERSIDE CEMENT COMPANY (hereinafter "Riverside") are made defendants herein. Amcord's principal place of business in 610 Newport Center Drive, Newport Beach, California; Riverside's principal place of business is 1500 Rubidoux Boulevard, Riverside, California. Amcord is engaged primarily in the business of producing portland cement through its five operational manufacturing plants located in Crestmore and Oro Grande, California; Detroit, Michigan; Clarksdale, Arizona; and Stockertown, Pennsylvania. Riverside is engaged in the business of producing portland cement at its manufacturing plant located at Riverside, California. In 1974, Amcord's total sales of cement were approximately $100 million. During the period of time covered by this complaint, Amcord has sold cement within the State of California. Reference herein to Amcord shall be taken as referring to Amcord and any subsidiary corporation or division owned or controlled by Amcord, specifically including Riverside.

10. CALIFORNIA PORTLAND CEMENT COMPANY, a California corporation (hereinafter "California Portland") is made defendant herein. California Portland's principal place of business is 800 Wilshire Boulevard, Los Angeles, California. California Portland is engaged primarily in the business of producing portland cement through its three operational manufacturing plants located in Colton and Mohave, California, and Rillito, Arizona. In 1974, California Portland's total sales of cement were approximately $60 million. During the period of time covered by this complaint, California Portland has sold cement within the State of California. Reference herein to California Portland shall be taken as referring to California Portland and any subsidiary corporation or division owned or controlled by California Portland.

11. KAISER CEMENT & GYPSUM CORPORATION, a California corporation (hereinafter "Kaiser") is made a defendant herein. Kaiser's principal place of business is 300 Lakeside Drive, Oakland, California. Kaiser is engaged primarily in the business of producing portland cement through its five operational manufacturing plants located in Permanente and Lucerne Valley, California; San Antonio, Texas; Waianae, Hawaii; and Montana City, Montana. In 1974, Kaiser's total sales of cement were approximately $113 million. During the period of time covered by this complaint, Kaiser has sold cement within the State of California. Reference herein to Kaiser shall be taken as referring to Kaiser and any subsidiary corporation or division owned or controlled by Kaiser.

12. SOUTHWESTERN PORTLAND CEMENT COMPANY, a Delaware corporation (hereinafter "Southwestern") is made a defendant herein. Southwestern's

principal place of business is 1034 Wilshire Boulevard, Los Angeles, California. Southwestern is engaged primarily in the business of producing portland cement through its five operational manufacturing plants located in Victorville, California; Fairburn, Ohio; and El Paso, Odessa and Amarillo, Texas. In 1974, Southwestern's total sales of cement were approximately $70 million. During the period of time covered by this complaint, Southwestern has sold cement within the State of California. Reference herein to Southwestern shall be taken as referring to Southwestern and any subsidiary corporation or division owned or controlled by Southwestern.

13. GENERAL PORTLAND, CEMENT COMPANY, INC., a Delaware Corporation (hereinafter "General") is made a defendant herein. General's principal place of business is Dallas, Texas. General is engaged primarily in the business of producing portland cement through its operational manufacturing plants located in Dallas, Ft. Worth and Houston, Texas; Tampa and Miami, Florida; N. Chattanooga, Tenn.; Fredonia, Kansas; Paulding, Oregon; and Los Robles, California. In 1974 General's total sales of cement were approximately $174 million. During the period of time covered by this complaint, General has sold cement within the State of California. Reference herein to General shall be taken as referring to General and any subsidiary corporation or division owned or controlled by General.

14. LONE STAR INDUSTRIES, INC., a Delaware corporation (hereinafter "Lone Star") is made a defendant herein. Lone Star's principal place of business is Greenwich, Connecticut. Lone Star is engaged primarily in the business of producing portland cement through its operational manufacturing plants located in Davenport, California; Greencastle, Pa.; Donner Springs, Kansas;

New Orleans, La.; Nasereth, Pa.; Seattle, Wash.; Houston and Meryneal, Texas. In 1974, Lone Star's total sales of cement were approximately $652 million. During the period of time covered by this complaint, Lone Star has sold cement within the State of California. Reference herein to Lone Star shall be taken as referring to Lone Star and any subsidiary corporation or divisions owned or controlled by Lone Star.

15. THE FLINTKOTE CO., a Massachusetts corporation (hereinafter "Flintkote") is made defendants herein. Flintkote's principal place of business is White Plains, New York. Flintkote is engaged in the business of producing portland cement through its operational manufacturing plants located in Kosmosdale, Ky.; Glen Falls, N.Y.; Middle Branch, Ohio; and San Andreas, California. In 1974, Flintkote's total sales of cement were approximately $480 million. During the period of time covered by this complaint, Flintkote has sold cement within the State of California. Reference herein to Flintkote shall be taken as referring to Flintkote and any subsidiary corporation or division owned or controlled by Flintkote.

16. MONOLITH PORTLAND CEMENT COMPANY, a Nevada corporation (hereinafter "Monolith") is made a defendant herein. Monolith's principal place of business is Los Angeles, California. Monolith is engaged primarily in the business of producing portland cement through its operational manufacturing plants located in Monolith, California and Laramie, Wyoming. In 1974, Monolith's total sales of cement were approximately $525 million. During the period of time covered by this complaint, Monolith has sold cement in the State of California. Reference herein to Monolith shall be taken as referring to Monolith and any subsidiary corporation or division owned or controlled by Monolith.

17. IDEAL BASIC INDUSTRIES, INC., a Colorado corporation (hereinafter "Ideal"), is hereby made a defendant herein. Ideal's principal place of business is Denver, Colorado. Ideal is engaged primarily in the business of producing Portland through its operational manufacturing plants located in Ada, Oklahoma; Boettcher and Portland, Colorado; Castle Hayne, North Carolina; Devil's Slide, Utah; Houston, Texas (2 plants); Knoxville, Tennessee; Mobile, Alabama; Okay, Arkansas; Seattle, Washington; Superior, Nebraska; Tijeras, New Mexico; and Trident, Montana. In 1974, Ideal's total sales of cement were approximately $203 million. During the period of time covered by this complaint, Ideal has manufactured and sold cement in the State of California. Reference herein to Ideal shall be taken as referring to Ideal and any subsidiary corporation or division owned or controlled by Ideal.

IV

CO-CONSPIRATORS

18. Various individuals and companies not made defendants herein participated in the violations hereinafter alleged and performed acts and made statements in furtherance thereof.

V

CLASS ACTION ALLEGATIONS

19. Plaintiff, the State of California, brings this action pursuant to Rule 23, Federal Rules of Civil Procedure, as a class action on behalf of a class of all political subdivisions, public entities and districts which were formed and exist under the laws of the State of California which built or caused to be built for their own account, whether for

their own use, rental or sale, any structure or project of any kind or character, which structure or project was constructed, in whole or in part, with cement or any building material comprised of or made from cement during the period of time covered by this complaint.

20. Plaintiff is a member of said class; its claims are typical of the claims of all the class members; and it will fairly and adequately protect the interests of the class.

21. The class is so numerous that joinder of all members is impracticable. At a minimum, it consists of approximately 300 governmental entities within the State of California.

22. Plaintiff State of California can and will fairly and adequately protect and represent the interests of the entire class.

23. The claims of plaintiff State of California are identical to the claims of the class, and the defenses of each of the named defendants will be identical with respect to each and every member of the class.

24. The questions of law and fact common to the members of the class predominate over any questions affecting only individual members.

VI

DEFINITIONS

25. As used herein, "cement" means a binding agent which is comprised of limestone and clay or other ingredients such as lime, silica, iron oxide and alumnia which is ground and kiln fired and combined with gypsum. There are two basic types of cement, grey and white.

26. As used herein, "freight allowance" means the credit or rebate paid by manufacturers of cement to purchasers who take delivery of cement at mills or distribution terminals.

VII

TRADE AND COMMERCE

27. The manufacture and sale of cement is a substantial industry in the United States. In 1974, there were approximately 175 operational cement manufacturing plants in this country. Domestic shipments of portland cement in 1974 amounted to approximately 79.5 million short tons valued at approximately $2.1 billion.

28. The defendants named in paragraphs 8 through 17, above, with the exception of PCA, are engaged in the business of producing portland cement for sale. During the period of time covered by this complaint, these defendants manufactured and/or purchased cement from sources outside the State of California for sale within the State of California and/or manufactured cement within the State of California for sale outside the State of California. During that period, there was a substantial and continuous flow in interstate trade and commerce of cement manufactured by these defendants.

29. The production and sale of cement is highly concentrated. Members of the PCA account for more than 80 percent of the cement produced in the United States. During the period of time covered by this complaint, the defendants named in paragraphs 9 through 17 above accounted for virtually all the sales of cement within the State of California.

30. Cement is sold in bulk and in sacks. Bulk cement is sold either at a mill or distribution terminal for transportation by the customer or is delivered by common carrier to the customer's location. Sack cement is sold only through delivery by common carrier to the customer's location.

31. Cement is sold primarily to four categories of customers; (a) ready-mix suppliers which account for approximately 73 percent of cement sole and which use cement in the preparation of ready-mix concrete and grout for sale; (b) concrete product companies which account for approximately 10 percent of cement sold and which use cement in the manufacture of products containing cement such as prestress concrete, cement block and concrete pipe all for sale; (c) contractors which account for approximately 7 percent of cement sold and which use cement in the preparation of ready-mix concrete for sale; and (d) building material dealers which account for approximately 7 percent of cement sold and which purchase sack cement for resale. Miscellaneous categories of purchasers account for approximately 3 percent of cement sold. Some purchasers of cement may fall into two or more of these categories of purchasers.

32. Plaintiff, State of California, and the members of the class it represents, purchase or has purchased cement directly from the defendants named in paragraphs 9 through 17 above, and/or indirectly from members of the four categories described in the preceding paragraph, and are injured in these purchases as a result of defendants illegal acts.

COUNT ONE

33. Paragraphs 1 and 3 through 32 above are incorporated herein by this reference.

VII

VIOLATIONS ALLEGED

34. Beginning at a time unknown to plaintiff but believed to be before 1970 and continuing until the filing of this complaint, defendants engaged in a continuing

combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce within the State of California in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. Said combination and conspiracy may continue or reoccur unless the relief hereinafter prayed for is granted.

35. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among the above-named defendants and their co-conspirators to fix, maintain and stabilize prices for cement the substantial terms of which have been and are as follows:

(a) to reduce and eliminate competition in the sale of cement;

(b) to increase the prices for which cement is sold and the return on invested capital in connection with the manufacture and sale of cement;

(c) to establish uniform and agreed-upon mill prices for cement;

(d) to establish and maintain a system of pricing for cement resulting in uniform and agreed-upon delivered prices for cement;

(e) to establish agreed-upon freight allowances;

(f) to establish uniform and agreed-upon credit terms in connection with the sale of cement;

(g) to allocate customers and territories for the sale of cement;

(h) to restrict the territories within which and the purposes for which purchasers of cement could utilize the cement they purchased; and

(i) to establish agreed-upon categories of customers to whom cement would be sold.

In formulating and effectuating the aforesaid combination and conspiracy, the aforesaid defendants and co-conspirators did those things which they combined and conspired to do.

IX

EFFECTS

36. The aforesaid combination and conspiracy had the following effects, among others:

(a) the price of cement was maintained and stabilized at artificial and non-competitive levels;

(b) competition in the sale of cement between the above-named defendants and their co-conspirators was restricted, suppressed and restrained;

(c) purchasers of cement and of products comprised of or manufactured from cement were deprived of the benefits of free and open competition among the above-named defendants and their co-conspirators; and

(d) the prices paid by plaintiff and the class it represents for cement and products comprised of or manufactured from cement were higher than they would otherwise have been.

X

FRAUDULENT CONCEALMENT

37. At all times relevant hereto, plaintiff had no knowledge of the combination and conspiracy alleged or of any fact which might have lead to the discovery thereof until the filing of the civil complaint in *State of Arizona* v. *Portland Cement Assn., et al.*, Civil No. C76-672 PHX

CAM (D. Ariz.). Plaintiff did not and could not discover the violations complained of nor learn of its causes of action at an earlier date by the exercise of due diligence inasmuch as the unlawful conspiracy was actively concealed by defendants and others by use of elaborate schemes, artifices of fraud, secrecy, duress and coercion to avoid detection.

COUNT TWO

38. Plaintiff incorporates by reference paragraphs 1 through 37 above.

39. The continuous agreement, combination, conspiracy and concert of action in unreasonable restraint of the aforesaid trade and commerce is in violation of California Business and Professions Code §§ 16720 *et seq.*, commonly known as the Cartwright Act.

COUNT THREE

40. Paragraphs 1 through 37 above are incorporated herein by this reference.

41. The continuous agreement, combination, conspiracy and concert of action in unreasonable restraint of the aforesaid trade and commerce constitutes unfair competition and is in violation of California Civil Code § 3369.

XI

PRAYER

WHEREFORE, plaintiff prays:

1. That the Court determine, as soon as practicable, pursuant to Rule 23, Federal Rules of Civil Procedure, that this action may be maintained as class action and

that the State of California, by and through its Attorney General, is a proper class representative, and that the Court order that reasonable notice of this action be given to each and every member of the class represented by the State of California in this action.

2. That the Court adjudge and decree that the aforesaid combination and conspiracy and acts done in pursuance thereof were and are in an unreasonable restraint of the aforesaid trade and commerce in violation of 15 U.S.C. § 1 and California Business and Professions Code §§ 16720 *et seq.* and constitute unfair competition in violation of California Civil Code § 3369.

3. That the defendants, and each of them, be ordered to pay to plaintiff and to each and every member of the class described above an amount equal to the damages sustained by each as a result of the aforesaid violations, trebled, in accordance with section 4 of the Clayton Act, 15 U.S.C. § 15, and California Business and Professions Code § 16750.

4. That the defendants, and each of them, be ordered to pay to plaintiffs and to each and every member of the class described above civil penalties in an amount to be determined by the Court, in accordance with California Civil Code § 3370.1.

5. That the defendants, their officers, directors, agents, and employees and those persons in active concert of participation with any of them be enjoined and restrained from, in any manner, directly or indirectly, continuing, maintaining, or renewing the combination and conspiracy hereinbefore alleged, or from engaging in any other combination, conspiracy, contract, agreement, understanding or concert of action having a similar purpose or effect, and from adopting or following any practice,

plan, program, or device having a similar purpose or effect.

6. That plaintiff be awarded its costs of suit and a reasonable attorney's fee as required by section 4 of the Clayton Act and California Business and Professions Code § 16750.

7. That plaintiff have such other, further and different relief as the Court may deem just and proper in the premises.

DATED:

EVELLE J. YOUNGER, Attorney General
WARREN J. ABBOTT,
Assistant Attorney General
PETER K. SHACK,
Deputy Attorney General

By_____
PETER K. SHACK
Deputy Attorney General
Attorneys for Plaintiff the State of California

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury.

EVELLE J. YOUNGER, Attorney General
WARREN J. ABBOTT,
Assistant Attorney General
PETER K. SHACK,
Deputy Attorney General

By_____
PETER K. SHACK
Deputy Attorney General
Attorneys for Plaintiff the State of California

Appendix H

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil Action No. 3-77-326

In re: Cement and Concrete Antitrust Litigation

This Document relates to:

STATE OF MINNESOTA,

Plaintiff,

vs.

PORTLAND CEMENT ASSOCIATION;
ALPHA PORTLAND INDUSTRIES, INC.;
AMCORD, INC.;
ARKANSAS CEMENT CORPORATION;
ASH GROVE CEMENT COMPANY;
ATLANTIC CEMENT COMPANY, INC.;
CALIFORNIA PORTLAND CEMENT COMPANY;
CAPITOL AGGREGATES, INC.;
CENTEX CORPORATION, and its subsidiaries, CENTEX CEMENT CORPORATION and NEVADA CEMENT CO.;
CITADEL CEMENT CORPORATION;
COPLAY CEMENT MANUFACTURING CO.;
CYPRUS HAWAIIAN CEMENT CORP.;
DUNDEE CEMENT CO.;
FILTROL CORP. and its subsidiary, COLUMBIA CEMENT CORPORATION;
THE FLINTKOTE COMPANY;
GENERAL PORTLAND, INC.;
GIANT PORTLAND CEMENT CO.;
GIFFORD-HILL & CO., INC. and its subsidiary, GIFFORD-HILL PORTLAND CEMENT COMPANY;

IDEAL BASIC INDUSTRIES, INC.;
KAISER CEMENT & GYPSUM CORP.;
KEYSTONE PORTLAND CEMENT CO.;
LEHIGH PORTLAND CEMENT CO.;
LONE STAR INDUSTRIES, INC.;
LOUISVILLE CEMENT CO.;
MARQUETTE CO.;
MARTIN-MARIETTA CORP.;
MEDUSA CORPORATION;
MISSOURI PORTLAND CEMENT CO.;
MONARCH CEMENT CO.;
MONOLITH PORTLAND CEMENT CO.;
NATIONAL CEMENT COMPANY, INC.;
NATIONAL GYPSUM CO.;
NORTHWESTERN STATES PORTLAND CEMENT CO.;
OKC CORP.;
OREGON PORTLAND CEMENT CO.;
PENN-DIXIE INDUSTRIES, INC.
PORTLAND CEMENT COMPANY OF UTAH;
RIVER CEMENT COMPANY;
SAN ANTONIO PORTLAND CEMENT COMPANY;
SANTEE PORTLAND CEMENT CORPORATION;
SOUTHDOWN, INC., and its subsidiary, SOUTHWESTERN PORTLAND CEMENT COMPANY;
UNITED STATES STEEL CORPORATION and its UNIVERSAL ATLAS CEMENT division;
VALLEY CEMENT INDUSTRIES, INC.;
WHITEHALL CEMENT MFG. CO.; and
WYANDOTTE CEMENT INCORPORATED,

Defendants.

COMPLAINT AND DEMAND FOR JURY TRIAL

COMPLAINT

Plaintiff STATE OF MINNESOTA by its Attorney General, Warren Spannaus, for its complaint against the above-named defendants, on behalf of itself and the members of the class hereinafter alleged, and demanding a trial by jury, alleges as follows:

I.

JURISDICTION AND VENUE

1. The jurisdiction of this Court is based on 28 U.S.C. § 1337 (1976), which grants original jurisdiction to the district courts over any civil action or proceeding arising under any act of Congress regulating or protecting trade and commerce against restraints and monopolies. This action is brought pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), to recover treble damages, the costs of suit, and reasonable attorneys' fees, for the injuries sustained by plaintiff and the class it represents as a result of violations of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976). This action is also brought pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26 (1976), to prevent such injuries and violations from occurring in the future, and for the costs of suit and reasonable attorneys' fees. This Court has pendent jurisdiction over Count II of this complaint which alleges violations of the Minnesota Antitrust Law, Minn. Stat. §§ 325.8011-8028 (1978).

2. Venue as to each defendant lies in this judicial district pursuant to Section 12 of the Clayton Act, 15 U.S.C. § 22 (1976) and 28 U.S.C. § 1391(b) and (c) (1976). Each of the defendants named in this complaint resides, is found, has an agent or transacts business in the District of Minnesota. The unlawful acts done pursu-

ant to the combinations and conspiracies alleged have been performed and carried on, in part, within the District of Minnesota and have injured plaintiff within the District of Minnesota.

3. Each defendant is within the jurisdiction of this Court for the purpose of service of this complaint.

4. The interstate trade and commerce described herein is carried on, in part, into, within and from the District of Minnesota. As appears more fully below, the acts and violations complained of herein were within the flow of interstate trade and commerce and had a direct and substantial impact on that trade and commerce.

II.

DEFINITIONS

5. As used herein, "cement" means a binding agent which is comprised of limestone and clay or other ingredients, such as lime, silica, iron oxide and alumina, which is ground and kiln fired and combined with gypsum. There are two basic types of cement, grey and white.

6. As used herein, "ready-mix concrete" means a mixture of cement and other materials such as sand, stone and water and at times, additives, which mixture is used in the construction and improvement of roads, structures and various other projects.

7. As used herein, "freight allowance" means the credit or rebate paid by manufacturers of cement to purchasers who take delivery of cement at mills or distribution terminals.

8. As used herein, "freight absorption" means the amount of freight charges paid by producers of cement in

order to make delivered sales of cement at the price determined under defendants' pricing formula.

III.

PLAINTIFF

9. Plaintiff State of Minnesota brings this action on its own behalf and on behalf of the class hereinafter alleged. Plaintiff, through its various departments, political subdivisions and public agencies, and the members of the class hereinafter alleged, have purchased large quantities of cement, and cement and concrete products including ready-mix concrete, grout, prestressed concrete, cement block, and concrete pipe during the period covered by this complaint. Furthermore, plaintiff and the members of the class hereinafter alleged have built or caused to be built structures and projects constructed, in whole or in part, with cement and/or cement products, including prestressed concrete, cement block, concrete pipe, and other building materials comprised of cement, during the period of this complaint. All purchases have been made either from one or more defendants or their co-conspirators or from defendants or co-conspirators through non-conspirator contractors or distributors and plaintiff has sustained damages as a result of the combinations and conspiracies in violation of the antitrust laws herein alleged.

IV.

DEFENDANTS

10. Defendant Portland Cement Association ("PCA") in a corporation organized under the laws of the State of Illinois with its principal place of business at 5420 Old Orchard Road, Skokie, Illinois. The PCA is a trade

association or business organization engaged in the manufacture of portland cement within the United States, its territorial possessions and Canada. As of 1974, its membership included thirty-six United States companies and nine Canadian companies which accounted for over eighty (80%) percent of the cement produced in the United States and all of the cement produced in Canada. One of the activities of PCA is to conduct a "national accounts marketing program" through which it markets cement throughout the United States and Canada on behalf of its members.

11. Defendants named below (collectively the "Producers") are corporations engaged, directly or through subsidiaries or divisions, in the production, distribution and sale of cement. Each of them is, or has been, a member of the PCA or is controlled or owned by a member of the PCA or by officers or directors of a member of the PCA. Each corporation named is organized under the laws of the state and has its principal place of business in the city indicated on the following table.

COMPANY	STATE OF INCORPORATION	PRINCIPAL PLACE OF BUSINESS
Alpha Portland Industries, Inc.	New Jersey	Easton, Pennsylvania
Amcord, Inc.	Delaware	Newport Beach, California
Arkansas Cement Corporation	Delaware	Little Rock, Arkansas
Ash Grove Cement Company	Delaware	Kansas City, Missouri
Atlantic Cement Company, Inc.	Delaware	Stamford, Connecticut
California Portland Cement Company	California	Los Angeles, California
Capitol Aggregates, Inc.	Texas	San Antonio, Texas
Centex Corporation	Nevada	Dallas, Texas
Centex Cement Corporation, subsidiary of Centex Corporation	Delaware	Corpus Christi, Texas
Citadel Cement Corporation	New Jersey	Atlanta, Georgia
Copley Cement Manufacturing Co.	Pennsylvania	Nazareth, Pennsylvania
Cyprus Hawaiian Cement Corp.	Hawaii	Honolulu, Hawaii
Dundee Cement Co.	Delaware	Dundee, Michigan
Filtrol Corp. and its subsidiary, Columbia Cement Corporation	Delaware	Wilmington, Delaware

COMPANY	STATE OF INCORPORATION	PRINCIPAL PLACE OF BUSINESS
The Flintkote Company	Massachusetts	White Plains, New York
General Portland, Inc.	Delaware	Dallas, Texas
Giant Portland Cement Co.	Delaware	Columbia, South Carolina
Gifford-Hill & Co., Inc. and its subsidiary Gifford-Hill Portland Cement Company	Delaware	Dallas, Texas
Ideal Basic Industries, Inc.	Colorado	Denver, Colorado
Kaiser Cement & Gypsum Corp.	California	Oakland, California
Keystone Portland Cement Co.	Pennsylvania	Allentown, Pennsylvania
Lehigh Portland Cement Co.	Pennsylvania	Allentown, Pennsylvania
Lone Star Industries, Inc.	Delaware	Greenwich, Connecticut
Louisville Cement Co.	Kentucky	Louisville, Kentucky
Marquette Co.	Delaware	Nashville, Tennessee
Martin-Marietta Corp.	Maryland	New York, New York
Medusa Corporation	Ohio	Cleveland, Ohio
Missouri Portland Cement Co.	Delaware	St. Louis, Missouri
Monarch Cement Co.	Kansas	Humboldt, Kansas
Monolith Portland Cement Co.	Nevada	Los Angeles, California
National Cement Company, Inc.	Alabama	Montgomery, Alabama
National Gypsum Co.	Delaware	Buffalo, New York
Nevada Cement Co., subsidiary of Centex Corporation	Nevada	Reno, Nevada
Northwestern States Portland Cement Co.	Iowa	Mason City, Iowa
OKC Corp.	Delaware	Dallas, Texas
Oregon Portland Cement Co.	Nevada	Portland, Oregon
Penn-Dixie Industries, Inc.	Delaware	New York, New York
Portland Cement Company of Utah	Utah	Salt Lake City, Utah
River Cement Company	Delaware	St. Louis, Missouri
San Antonio Portland Cement Company	Texas	San Antonio, Texas
Santee Portland Cement Corporation	South Carolina	Holly Hill, South Carolina
Southdown, Inc. and its subsidiary, Southwestern Portland Cement Company	Delaware	Houston, Texas
United States Steel Corporation and its Universal Atlas Cement division	Delaware	New York, New York
Valley Cement Industries, Inc.	Mississippi	Jackson, Mississippi
Whitehall Cement Mfg. Co.	Pennsylvania	Whitehall, Pennsylvania
Wyandotte Cement Incorporated	Michigan	Wyandotte, Michigan

Reference herein to each of these defendants shall be taken as referring to said defendant and to any subsidiary corporation or division owned or controlled by said defendant whether such subsidiary or division is named in this complaint or not.

V.

CO-CONSPIRATORS

12. Various individuals and companies not made defendants herein participated as co-conspirators in the violations hereinafter alleged and performed acts and made statements in furtherance thereof.

VI.

CLASS ACTION ALLEGATIONS

13. Plaintiff brings this action pursuant to Rule 23, Federal Rules of Civil Procedure, as a class action on its own behalf and as representative of a class of all Minnesota governmental entities, excluding agencies of the U.S. Government, which purchased cement and cement products, including ready-mix concrete, grout, prestressed concrete, cement block and concrete pipe and/or which built or caused to be build, for their own account, any structure or project of any kind or character, which structure or project was constructed, in whole or in part, with cement and/or cement products including prestressed concrete, cement block, and concrete pipe, or any building material comprised of or made from cement during the applicable time period. The class includes, but is not necessarily limited to, the State of Minnesota, its cities, counties and political subdivisions, school boards or districts, universities and colleges, municipalities, and all other governmental entities within the State of Minnesota, except agencies of the United States Government.

14. The class is so numerous that joinder of all class members is impracticable. At minimum, the class consists of approximately 1,503 governmental entities within the State of Minnesota.

15. The claims of plaintiff and the class members involve common questions of law and fact which predominate over any questions affecting only individual members of the class. The common questions of fact include the existence of the conspiracy as alleged and whether the members of the class were injured by the conspiracy alleged. The questions of law common to the members of the class include the legality of the conspiracy as alleged and the liability of defendants to class members for injury to their business or property interests.

16. Plaintiff is a member of the class and its claims are typical of the claims of the other members of the class and plaintiff will fairly and adequately protect the interests of the class members.

17. A class action is superior to other available methods for the fair and efficient adjudication of the controversy herein described.

VII.

TRADE AND COMMERCE

18. The production and sale of cement is a substantial industry in the United States. In 1974, there were approximately 175 operational cement manufacturing plants in this country. Domestic shipments of cement in 1974 alone were approximately 79.5 million short tons valued at approximately $2.1 billion. Throughout the period of time covered by this complaint, there was a substantial and

continued flow of cement in interstate trade and commerce.

19. The production, distribution and sale of cement, concrete, and cement-concrete products by defendants constitute trade and commerce among the several states and the District of Columbia within the meaning of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976). The conspiracy alleged in this complaint restrained the trade and commerce in cement in and among the several states.

20. The production and sale of cement is highly concentrated. During the period of time covered by this complaint, the defendants named in paragraph 11 above accounted for virtually all of the sales of cement within the State of Minnesota.

21. Cement is primarily sold by the Producers directly to four categories of purchasers:

(a) ready-mix producers which use cement to prepare ready-mix concrete and grout for sale to general building engineering and paving contractors and other purchasers thereof;

(b) general building, engineering or paving contractors which use cement to prepare their own concrete or for other construction purposes;

(c) cement-concrete product companies which use cement for the manufacture of products containing cement such as prestressed concrete, cement block and concrete pipe; and

(d) building material dealers which purchase sack cement for resale.

Miscellaneous categories of purchasers account for the minimal remainder of cement sold. Some purchasers of cement may fall into two or more of these categories.

22. The purchasers of cement in each of the four categories described in the preceding paragraph pass on to their customers, including plaintiff and the members of the class, the full price of cement and all increases in the price of cement through a variety of means including pre-existing cost-plus contracts, where the purchasers are owned or controlled by cement manufacturers or through other situations where normal market forces have been superseded.

23. Much of the cement purchased by plaintiff and the members of the class was produced outside the State of Minnesota and transported across state lines into Minnesota. The acts complained of herein have a direct and substantial impact on the flow of such cement in interstate commerce.

VIII.

COUNT I

VIOLATIONS ALLEGED

24. Paragraphs 1 through 23 above are herein incorporated by reference.

25. Beginning at a time unknown to plaintiff but believed to be during or before 1968 and continuing until the filing of this complaint, defendants engaged in a continuing combination or conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce within the State of Minnesota in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976). Said combination and conspiracy may continue or reoccur unless the relief hereinafter prayed for is granted.

26. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and

concert of action among the above-named defendants and their co-conspirators to fix, maintain and stabilize prices for cement, the substantial terms of which have been and are as follows:

(a) to reduce and eliminate competition in the sale of cement;

(b) to increase mill prices for the sale of cement in uniform and agreed-upon amounts;

(c) to establish, maintain and follow a uniform and agreed-upon formula under which the delivered price quoted for cement is the lowest sum of mill price plus the freight rate to the destination where the cement is to be used, said formula resulting in uniform and agreed-upon delivered prices for cement;

(d) to fix, stabilize and maintain mill prices for the sale of cement;

(e) to establish, maintain, and utilize agreed-upon freight allowances and freight absorption in connection with the sale of cement;

(f) to establish, maintain, and utilize uniform and agreed-upon credit terms, and other terms and conditions for the sale of cement;

(g) to allocate customers and territories for the sale of cement; and

(h) to create an artificial and continued shortage in the production and sale of cement.

EFFECTS

27. The aforesaid combination and conspiracy has had the following effects, among others:

(a) the price of cement was maintained and stabilized at artificial and noncompetitive levels;

(b) competition in the sale of cement between the defendants and their co-conspirators was restricted, suppressed and restrained;

(c) purchasers of cement and cement products including, but not limited to, ready-mix concrete, grout, prestressed concrete, concrete block, and concrete pipe, were deprived of the benefits of free and open competition among the defendants and their co-conspirators; and

(d) the prices paid by plaintiff and the class it represents for cement and cement products were higher than they otherwise would have been.

COUNT II.

JURISDICTION AND VENUE

28. Plaintiff realleges herein the allegations contained in paragraphs 1-4 above.

29. Jurisdiction to bear and determine other antitrust claims herein alleged under the Minnesota Antitrust Law of 1971, Minn. Stat. §§ 325.8011-.8028 (1978), and its predecessor statute, Minn. Stat. § 325.01 (1969) (repealed 1971), is conferred upon this Court by the doctrine of pendent jurisdiction.

VIOLATIONS ALLEGED

30. Plaintiff realleges herein the allegations contained in paragraphs 5-12 and 20-27 above.

31. Beginning at least as early as 1968, the exact date being unknown to plaintiff, and continuing thereafter to

and including the date of filing of this complaint, the defendants and co-conspirators engaged in a continuing combination and conspiracy in unreasonable restraint of the aforesaid trade and commerce in violation of the Minnesota Antitrust Law of 1971, Minn. Stat. §§ 325.8011-.8028 (1978), specifically Minn. Stat. §§ 325.8013-.8015 (1978) and their predecessor statute, Minn. Stat. § 325.01 (1969) (repealed 1971).

32. Plaintiff State of Minnesota alleges that because this Court has pendent jurisdiction over the matters alleged in Count II, it can therefore grant plaintiff appropriate relief pursuant to Minn. Stat. §§ 325.8018, .8019, .8020 (1978).

IX.

FRAUDULENT CONCEALMENT

33. At all times relevant thereto, plaintiff had no knowledge of the existence of its cause of action based upon defendants' combination and conspiracy or of any fact which might have led to the discovery thereof, until the filing of the civil complaint in *State of Arizona v. Portland Cement Association, et al.*, Civil No. C76-672 PHX CAM (D. Ariz. 1976). Plaintiff did not and could not discover the violations complained of nor learn of its cause of action at an earlier date by the exercise of due diligence because the defendants and others, actively, successfully, and fraudulently concealed their violations by use of elaborate schemes, articles of fraud, secrecy, duress and coercion to avoid detection.

X.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays;

1. That the Court order summonses to be issued pursuant to Section 5 of the Sherman Act, 15 U.S.C. § 5 (1976), to any defendant not found within the District of Minnesota, commanding such defendant to appear and answer.

2. That the Court determine, as soon as practicable, pursuant to Rule 23, Federal Rules of Civil Procedure, that this action may be maintained as a class action and that the plaintiff State of Minnesota is a proper class representative of the class described and that the Court order that the best notice practicable under the circumstances be given to each member of the class represented by the plaintiff State of Minnesota in this action.

3. That the Court adjudge and decree that the defendants and co-conspirators have engaged in unlawful combinations and conspiracies in restraint of the aforesaid trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976) and Minn. Stat. §§ 325.8011-8028 (1978).

4. That the defendants, and each of them, be ordered to pay to plaintiff and each and every member of the class represented by plaintiff an amount equal to the damages sustained by each as a result of the aforesaid violations, trebled, in accordance with Section 4 of the Clayton Act, 15 U.S.C. § 15 (19876) and Minn Stat. § 325.8019 (1978).

5. That the defendants, their officers, directors, agents and employees and those persons in active concert or participation with any of them be enjoined and restrained from, in any manner, directly or indirectly, continuing,

maintaining, or renewing the combination and conspiracy hereinbefore alleged or from engaging in any other combination, conspiracy, contract, agreement, understanding or concert of action having a similar purpose or effect, and from adopting or following any practice, plan, program, or device having or facilitating a similar purpose or effect.

6. That plaintiffs be awarded their costs of suit and reasonable attorneys' fees as required by Section 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, (1976), and Minn. Stat. § 325.8019 (1978).

7. That the defendants, and each of them, be ordered to pay to plaintiff State of Minnesota a civil penalty in the sum of Fifty Thousand Dollars ($50,000.00) pursuant to Minn. Stat. § 325.8018(1) (1978).

8. That plaintiff, and each and every member of the class, have such further or different relief as the law may require or this Court deems just and proper.

Dated: June 19, 1979.

WARREN SPANNAUS
Attorney General
State of Minnesota

RICHARD B. ALLYN
Solicitor General

By ALAN H. MACLIN

ALAN H. MACLIN
Special Assistant
Attorney General

and THOMAS W. KENYON

THOMAS W. KENYON
Special Assistant
Attorney General

720 American Center Building
150 East Kellogg Boulevard
Saint Paul, Minnesota 55101
Telephone: (612) 296-1796

Attorneys for Plaintiff
State of Minnesota

All correspondence and service of papers should be directed to or made on Thomas W. Kenyon, Special Assistant Attorney General, 720 American Center Building, 150 East Kellogg Boulevard, St. Paul, Minnesota 55101; Attorney for Plaintiff.

JURY DEMAND

Plaintiff, pursuant to Rule 38 of the Federal Rules of Civil Procedure, demands a trial by jury.

Dated: June 19, 1979

WARREN SPANNAUS
Attorney General
State of Minnesota

By THOMAS W. KENYON

THOMAS W. KENYON
Special Assistant
Attorney General

720 American Center Building
150 East Kellogg Boulevard
Saint Paul, Minnesota 55101
Telephone: (612) 296-1796

Attorney for Plaintiff
State of Minnesota

APPENDIX I

STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE

July 5, 1979

Josef D. Cooper, Esq.
Suite 600
300 Montgomery Street
San Francisco, CA 94104

RE: Cement and Concrete Antitrust Litigation

Dear Joe:

I have presented River Cement's settlement offer to the Attorney General, and it has been tentatively approved pending examination of the actual agreement. It was approved on the understanding that the agreement releases all claims against River, including both direct and indirect claims and all claims asserted under state law.

As you are aware, Count II of California's Complaint alleges violations of the Cartwright Act, Business & Professions Code § 16720 et seq. Section 16750 was amended recently to obviate the possible effects of *Illinois Brick* under state law and allow recovery for indirect purchaser. This amendment has retroactive effect. Furthermore, Count III of California's Complaint alleges violation of the California Unfair Competition Statute, Business & Professions Code § 17200 et seq. (formerly Civil Code § 3369). This section permits civil penalties for

antitrust violations. A motion to dismiss Count III was made by defendants in the Central District of California before the California case was transferred to Phoenix. Judge Whelan denied defendants' motion to dismiss this claim.

As soon as we receive and review the actual settlement agreement, and when the Attorney General or his chief deputy approves, I will inform you and immediately forward the executed signature page.

Sincerely,

GEORGE DEUKMEJIAN
Attorney General

PETER K. SHACK
Deputy Attorney General
(213) 736-2036

PKS:lc

cc: Kenneth R. Reed, Esq.
William C. Barnard, Esq.

STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
[LETTERHEAD]

July 23, 1979

Josef D. Cooper, Esq.
Suite 600
300 Montgomery Street
San Francisco, CA 94101

RE: Cement and Concrete Antitrust Litigation

Dear Joe:

We have reviewed the settlement agreement between plaintiffs and River Cement Company. Enclosed is an executed signature page on behalf of the State of California.

As I mentioned in my letter to you of July 5, 1979, California has alleged violations of state antitrust law in its complaint. That law specifically allows for recovery of damages by both indirect and direct purchasers. Judge Muecke is aware of this claim. I highlighted it in the California-Oregon section of Plaintiffs' Class Reply Brief and specifically mentioned it during oral argument.

Furthermore, California's complaint seeks civil penalties pursuant to state law. This claim has already withstood defendants' motion to dismiss.

The settlement agreement with River releases all claims under federal or state antitrust law, including direct and indirect claims. The definition of the California Governmental Class, however, is not followed by an agreement of the parties that the definition includes both direct and indirect purchasers as provided by state law. We have decided not to insist at this time on inclusion of appropriate language in order not to delay what is surely a monetarily advantageous and strategically vital settlement. California does not waive its right to insist on such language in any subsequent settlement agreement.

In addition, so that our position is clear to all, we have executed this settlement agreement on the understanding, based upon the discussion at plaintiffs' counsel meeting on June 25, 1979, that indirect purchaser claims may be asserted when settlement funds are allocated among plaintiffs. Failure to achieve an agreement on this issue among plaintiffs will necessitate resolution by the court.

Thank you for your cooperation. If you have any questions, please contact me.

Cordially,
GEORGE DEUKMEJIAN
Attorney General

PETER K. SNACK
Deputy Attorney General
(213) 736-2036

FKS:lc
Encl.

cc: All Plaintiffs' Counsel (w/o enc.)

STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
[LETTERHEAD]

August 12, 1980

Josef D. Cooper, Esq.
Suite 600
300 Montgomery Street
San Francisco, CA 94101

Re: Cement and Concrete Antitrust Litigation

Dear Joe:

Enclosed is a signed signature page in connection with the Gifford-Hill/Amcord Settlement. Use of this signature is conditioned on approval by the head of our Criminal Division, who has just returned from vacation. I will advise you by telephone, and follow with confirming letter when he approves the settlement.

To save time and make my record, I enclose a copy of my July 23, 1979 letter to you concerning our position on the River Settlement. Our position is unchanged.

Cordially,

GEORGE DEUKMEJIAN
Attorney General

PETER K. SHACK
Deputy Attorney General

PKS:la

LAW OFFICES OF JOSEPH D. COOPER
[LETTERHEAD]

August 13, 1979

Gregory D. Hoffman, Esq.
Assistant Attorney General
Antitrust Division
Attorney General of Missouri
Jefferson City, Missouri 65101

Re: Cement and Concrete Antitrust Litigation

Dear Greg:

Reference is made to your August 3, 1979 letter regarding the ultimate distribution of the River settlement proceeds. Similar letters have been received from counsel for several other states, including California, Montana, Alabama and Minnesota. This is a subject which has been discussed by many counsel, including the references made at the meeting of all plaintiffs' counsel in Phoenix prior to the June 26, 1979 Pretrial Conference. The following is my understanding of the situation, which I hope is the same as that of everyone else.

All questions relating to allocation of the settlement proceeds have been preserved to a later date, without any waiver and/or commitment by anyone with regard to the formula which will be adopted. Given (1) the time which would be consumed in negotiating a distribution formula, (2) the potentially disruptive effect of negotiating such a formula at this time with counsel having differing interests to advance, (3) the possibility of changes in the law, and (4) the fact that the River settlement likely will be consumed by litigation expenses, the consensus was that we should not attempt to resolve the allocation question at this time. Specifically, this means that any class mem-

ber who has indirect purchases may advance a distribution formula which recognizes a possible state law claim. Similarly, for example, Ken Reed has frequently stated that he contemplates arguing that damages were greater in Arizona than in the rest of the country, and that there should be a geographic weighting included in any distribution formula. Allocation of the settlement proceeds is a particularly sensitive subject to certain counsel, like myself, who represent clients (the City of Austin) whose indirect claim may be larger than a claim based solely on direct purchases.

While there may be variations in nomenclature, everyone seems to agree that the division of the spoils should await the receipt of adequate spoils to justify the fight. From personal conversations, I know that Ken Reed, Bill Barnard and Fred Purth share this view. Accordingly, no one shall deem you or any other counsel to have waived the right to argue that one of the factors to be considered in devising an allocation formula should be an increment for indirect purchases where appropriate under state law. I hope we have the opportunity to reach that donnybrook in the near future.

Best personal regards.

Sincerely,

Josef D. Cooper

JSC:ag
cc. All Plaintiffs' Counsel

LAW OFFICES OF JOSEPH D. COOPER
[Letterhead]

September 13, 1980

Peter E. Shack, Esq.
Deputy Attorney General
State of California
Department of Justice
3580 Wilshire Boulevard
Los Angeles, California 90010

Re: Cement and Concrete Antitrust Litigation

Dear Peter:

Pardon my delay in responding to your August 12, 1980 letter, forwarding your signature for the Gifford-Hill/Amcord Settlement Agreement. Attached to that letter was a copy of your earlier correspondence of July 23, 1979, which relates to the ultimate allocation of the settlement proceeds among the various plaintiffs and members of the classes. Also to save time, I refer you to my August 13, 1979 letter addressed to Greg Hoffman, then Assistant Attorney General for the State of Missouri, in which I stated the common understanding on these matters, i.e., no one has waived any right or position, and when the litigation is concluded against defendants, all plaintiffs are free to engage in any "donnybrook" that may be appropriate to divide up the "spoils." I

presume this agreement will remain unchanged unless and until advised otherwise.

Best personal regards.

Sincerely,

JOSEF D. COOPER

JDC:ag

cc: Kenneth R. Reed, Esq.
Frederick P. Furth, Esq.
William C. Barnard, Esq.

STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
[Letterhead]

March 23, 1981

EXPRESS MAIL

Josef D. Cooper, Esq.
Suite 600
300 Montgomery St.
San Francisco, CA 94104

Re: Cement Antitrust Litigation

Dear Joe:

Enclosed is the executed signature page for the Atlantic Cement settlement agreement.

You are authorized to use this, as with the prior settlements, in accord with my letter of July 13, 1979 relating to California's state law claims.

Very truly yours,

GEORGE DEUKMEJIAN
Attorney General

PETER K. SHACK
Deputy Attorney General

PKS:me
Encl.

STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL
[Letterhead]

EXPRESS MAIL

Josef D. Cooper, Esq.
Law Offices of Josef D. Cooper
Suite 600
300 Montgomery Street
San Francisco, California 94104

Re: Cement and Concrete Antitrust Litigation, MDL 296; Northwestern States Portland Settlement Agreement

Dear Joe:

The State of Minnesota has signed the enclosed signature page which may be used with the "Settlement Agreement with Defendant Northwestern States Portland Cement Co.," in accordance with the understanding set forth below.

The State of Minnesota agrees that the Northwestern Settlement is very advantageous for all Plaintiffs for the reasons outlined in your March 3, 1981 memorandum. Minnesota has alleged violations of state law in its complaint and the settlement agreement with Northwestern releases all claims under both federal and state antitrust laws. As expressed in earlier discussions and my letter of July 31, 1979, Minnesota's understanding is that, since

both state and federal claims are being released by this Settlement, we will be entitled to have both state and federal damage claims against the Settlement. We believe that the best way to handle this damage claim distribution will ultimately be via the State of Minnesota all Minnesota governmental entities.

Thus, my signature on behalf of the State of Minnesota be used on the condition that any plan of distribution supplied by plaintiffs before the Court will recognize all recoverage claims of Minnesota and its governmental entities under both state and federal antitrust laws.

Also enclosed, per Kirk McKinney's request, is the executed original of a letter addressed to Bob Shepard to allay Northwestern's particular concerns regarding the State of Minnesota. As with the signature page, this letter may be used only under the conditions described above.

With kind regards,

THOMAS KENYON
Special Assistant
Attorney General

Antitrust Division
(612) 296-1796

TK:dmg

Enclosures

cc: All Plaintiffs' Counsel
(w/o Enc.)

THE ATTORNEY GENERAL OF TEXAS
[LETTERHEAD]

August 7, 1979

Josef D. Cooper, Esq.
300 Montgomery St., Suite 600
San Francisco, California 94104

Re: Cement and Concrete Antitrust Litigation
Settlement Agreement with Defendant
River Cement Company

Dear Mr. Cooper

As I explained to you earlier, the Texas Attorney General's Office has not yet filed a separate lawsuit in the cement litigation. Before the Attorney General of Texas may file an antitrust suit for damages in federal court on behalf of the tax supported institutions and political subdivisions of the State of Texas, he is required, by Section 15.40 of the Texas Business and Commerce Code, to give those government notice of his intention to file such a suit behalf. The state's governmental entities thirty days within which to withdraw the a the Attorney General to act for them.

On August 2, 1979, we sent out notice / to join in the cement antitrust litigation approximately 4,000 cities, counties, schools, public hospitals, water districts and other entities in the State of Texas. At

the beginning September, we will file our class action in the Western District of Texas. Depending action of the Multidistrict Panel, we should the rest of the cement litigation in early complaint we intend to file includes a pend claim for damages based upon indirect purchases of cement. We may also include a claim for civil penalties based upon state law.

Of immediate concern is the Settlement Agreement executed with the River Cement Company. We have no objection to the substance of the agreement and we will be willing to join in the settlement at the appropriate time. Like the States of Alabama, California, Minnesota and Missouri, however, we are of the understanding that we will be able to assert both direct and indirect claims against the settlement fund based upon both the federal and pendent state claims which will be included in our complaint.

I am looking forward to working with you and all the other plaintiffs' counsel involved in this litigation. We are eager to assist the development of the suit, particularly in regard to this section of the country.

Yours truly,

LINDA AAKER
Assistant Chief
Consumer Protection and Antitrust
Division

kes
cc: All Plaintiffs' Counsel

ATTORNEY GENERAL OF MISSOURI
[LETTERHEAD]

August 3, 1979

Josef D. Cooper, Esq.
300 Montgomery St., Suite 600
San Francisco, CA 94104

Re: Cement and Concrete Antitrust Litigation Settlement Agreement with Defendant River Cement Company

Dear Joe:

We are in receipt of copies of various letters addressed to you by representatives of the States of Alabama, California and Minnesota concerning their recent execution of the Settlement Agreement With Defendant River Cement Company. As each state representative notes, the agreement fails to address the distinction between indirect and direct claims, in terms of distribution of the Settlement Fund, yet requires each settling plaintiff to relinquish and dismiss all claims against the settling defendant. Each state has advised it has executed the agreement with the express understanding that its respective claims from the Settlement Fund, for indirect purchases brought under pendant state actions, have not been relinquished.

The position of those states appears to be entirely consistent with Missouri's understanding of the River negotiations, the meeting of plaintiffs' counsel in Phoenix on June 25, and our conversations with various members of plaintiffs' steering committee. While we did not deem it necessary to confirm our understandings when forwarding our executed copy of the Agreement, we feel it is appropriate, in light of those recent communications, to

reaffirm our understandings. Again, we have executed the River Settlement agreement on the premise and with the understanding that the State of Missouri may assert both direct and indirect claims against the settlement fund based on both the federal and pendent state counts reflected in Missouri's complaint in this litigation.

We assume that unless we are informed otherwise within the next seven days, our understandings with respect to the settlement agreement are correct and agreed upon by plaintiffs' counsel.

Thank you for your continued assistance and effort in this matter.

Sincerely,

JOHN ASHCROFT
Attorney General

/s/ GREGORY D. HOFFMAN
Gregory D. Hoffmann
Assistant Attorney General
Antitrust Division

1jh
cc: all plaintiffs' counsel.

OFFICE OF THE ATTORNEY GENERAL
STATE OF ALABAMA
[LETTERHEAD]

July 20, 1979

Josef D. Cooper, Esquire
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San Francisco, California 94104

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Antitrust Division
State Capitol, West Wing, Room 303
Phoenix, Arizona 85007

Robert F. Hill, Esquire
Special Assistant Attorney General
Friedman & Hill
220 Equitable Building
730 Seventeenth Street
Denver, Colorado 80202

Re: Cement Antitrust Litigation

Dear Joe, Ken and Bob:

Enclosed is an executed signature page to be used in conjunction with the understanding discussed below.

The complaint filed by the State of Alabama in the referenced case includes a pendent state claim based upon an Alabama statute which authorizes recover for "direct and indirect injury caused by unlawful conspiracies in restraint of trade".

The settlement agreement between plaintiffs and defendant River Cement Company does not address the distinction between direct and indirect claims. The agreement does, however, require that each settling plaintiff dismiss all claims, both direct and indirect. Therefore, it is essential that Alabama not relinquish its valid pendent state claim without an understanding that it may assert both direct and indirect claims against settlement funds.

I submit the enclosed signature page with the following understanding:

It is my understanding that the settlement agreement all claims by plaintiffs and members of the plaintiff classes under Federal and State antitrust laws, for direct and indirect purchases, and for both monetary and injunctive relief. It is my further understanding that the allocation of settlement funds to the various claims is to be made pursuant to a subsequent allocation agreement among plaintiffs or, failing such agreement, is to be submitted to the Court for resolution. By executing this agreement, the State of Alabama does not waive its right to assert its claim for indirect purchases made by the State and members of the Alabama class against the settlement fund.

My understanding of the meaning of the settlement agreement is based upon the history of the settlement negotiations between plaintiffs and defendant River Cement Company, upon discussions at the meeting of plaintiffs' counsel in Phoenix, Arizona on June 25, 1979, and upon telephone conversations by Beth Farmer and/or me with Ken Reed, Bob Hill and Joe Cooper.

If there are any questions or objections, please contact me.

Thank you for your cooperation.

Very truly yours,

THOMAS TROY ZIEMAN, JR.
Assistant Attorney General
Chief, Antitrust Section

TTZ:bd
Enclosure
cc: All Plaintiffs' Counsel

APPENDIX J

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

THE STATE OF CALIFORNIA, on behalf of itself and all other political subdivisions, public agencies and districts of the State of California similarly situated

Plaintiffs,

vs.

PORTLAND CEMENT ASSOCIATION, et al.,

Defendants.

No. CV 76-4073-FW

ORDER DENYING MOTION TO DISMISS CLAIM FOR CIVIL PENALTIES

Filed March 18, 1977

The matter came on for hearing on Monday, February 28, 1977, when Defendants moved to Dismiss the Claim for Civil Penalties. Following presentation of argument by counsel, the matter was submitted for decision. After considering all arguments, both oral and written, and after considering all documents on file herein, the Court is of the opinion that the Motion should be denied.

Defendants also moved to Dismiss, to Strike, or, alternatively, to Compel a More Definite Statement. The Motion to Compel a More Definite Statement is granted. Plaintiffs will file their Amended Complaint, setting forth allegations of fraud with more specificity.

Accordingly,

IT IS ORDERED that the Motion to Dismiss the Claim for Civil Penalties is denied. Further,

IT IS ORDERED that the Motion to Compel a More Definite Statement is granted.

DATED this day of March, 1977.

FRANCIS C. WAYLAN

FRANCIS C. WAYLAN
United States District Judge

APPENDIX K

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

The Honorable Manuel L. Real, Chief,
United States District Judge,
Central District of California, Presiding

IN RE CEMENT AND CONCRETE
ANTITRUST LITIGATION.

MDL NO 296 PHX-MLR

REPORTER'S TRANSCRIPT OF PROCEEDINGS
Phoenix, Arizona
Friday, November 9, 1984

FLORENCE CARCIA
Official Court Reporter
442-D U.S. Courthouse
312 North Spring Street
Los Angeles, California 90012
(213) 628-3402

• • • •

MR. SPIEGEL: The point that I am trying to reach with all of this is that in this particular situation, in this settlement, there may in fact be no conflict between a claim by a direct, so-called direct purchaser, that is a general contractor, for cement on a particular highway and the indirect claim under state law by the state for the same highway. And if there is no such conflict in a settlement as we are talking about here, then there is no equity that would say that the state's claim should be thrown out automatically.

And I would submit to your Honor in Minnesota where their claims were submitted a month earlier than in California, they have made such a check. And as it turns out that the general contractors who do the work for the State of Minnesota by and large didn't even make any claims in this settlement. And that doesn't even reach the second question of if — had that general contractor made a claim, was he claiming the cement for the same project that the state was?

So, there are two — two points there, that it's twice removed. And what I'm saying is that in the California situation I would — if the 11 million tons that the state is claiming for, I would be very surprised if the — very much if any of that 11 million tons are being claimed by anybody else.

Now, we don't know that until the claims processing moves along sufficiently that those claims by the direct purchasers in California, if any, are identified and are further identified by looking at the invoices to see what projects those tons of cement were used for. And it would seem to me that that should be the first step before we throw out the California governmental class claims because again, talking in terms of equities, there's no doubt as to who pays for the highways in the state, it's paid for by the taxpayers.

And Illinois Brick made no pretense about giving a windfall to the direct purchasers. But if the direct purchaser isn't even claiming for the same cement as the state is and the indirect purchaser, it doesn't seem to me to be reasonable to give them a double windfall, that is, to let them collect money for projects for which they did supply cement and also to permit them to collect for the projects for which they did not supply any cement.

And to exclude the state from making —

THE COURT: Bring me past that again, Mr. Spiegel.

MR. SPIEGEL: I said, there is no reason to permit them to have the windfall for collecting — in collecting money on projects for which they did supply cement and also permitting them in essence to get money for projects in which they did not supply cement.

THE COURT: How do they do that unless they make a claim?

MR. SPIEGEL: Implicit in that is that by denying the state's claim, the state's claim for projects that are not otherwise claimed, were it to be allowed, it would dilute the settlement fund.

THE COURT: How is that a double recovery to the contractor if the contractor is not in here claiming some money here?

MR. SPIEGEL: It isn't. Double recovery is in enhancing his position at the expense of somebody else who has an equal —

THE COURT: How does he do it unless he is here as a member of the class?

MR. SPIEGEL: Because if he is here as a member of the class claiming — let's take this example. Let's take Guy Atkinson, a general contractor who does a substantial amount of California highway work. Now, I don't know whether Guy Atkinson made a claim or not. I expect they probably did not. But if they did, suppose they claimed five million tons of cement that they purchased and it turns out that of that five million tons that they claim only as an example one million was used on the California projects that the California Division of Highways, CalTrans, is claiming. So there would be four

million tons of cement that legitimately, on an equitable basis, California should be allowed to claim because California dismissed that claim at a time when it had a viable claim and dismissed it in compromise so that everybody could get this fund, a fund that never would have existed if California did not dismiss those claims. And those four million tons are thrown out and thereby, by throwing those out, Guy Atkinson's one million tons of cement achieve a higher value than they otherwise would have. In other words, that million tons of cement that they may have a legitimate claim for would have a lesser value if California's legitimate —

THE COURT: What you are saying is in the settlement I have to apply the pass-on theory.

MR. SPIEGEL: No. That has nothing to do with pass-on at all.

THE COURT: You mean Guy Atkinson recovers for the million tons and so does the State of California?

MR. SPIEGEL: No, no. Just the opposite.

THE COURT: Well, then, how can I do it except by pass-on?

MR. SPIEGEL: Because we are talking about five million tons, your Honor, one million of which Guy F. Atkinson used and then are passed on to the state, and four million which nobody else is claiming, and the state as the end user is claiming.

THE COURT: Okay.

MR. SPIEGEL: That is what we are talking about. It has no pass-on whatsoever in that situation. And I would argue as a minimum in that situation where no intermediary, where no general contractor, where no subcontractor is making a claim for the cement that was used on the

state highways, that at least the state ought to be able to make that claim since the state paid for that and everybody — every commentator who has ever written anything about Illinois Brick and the Illinois Brick Supreme Court itself admits that it's the end user who suffers the injury.

Now, the rule of Illinois Brick may have been an administrative rule for the courts to alleviate the burdens of having to do tracing, but where no tracing is involved in the situation which is the situation I am postulating to your Honor, it seems to be there is no equitable basis for throwing those claims out. And I don't see there has been any showing here by anybody upon which your Honor can make a determination that there is any conflicting claim or there is any need for pass-on.

Nobody here has made any argument and made any factual presentation —

THE COURT: But if there were, Mr. Spiegel, what you are indicating to me is I would have to apply pass-on.

MR. SPIEGEL: No, I'm not.

THE COURT: Then there would be a double recovery; wouldn't there?

MR. SPIEGEL: I have not reached that issue. I'm first trying to discuss with your Honor the issue whether there isn't a claim by an intermediary —

THE COURT: But I postulate to you, if there were a claim I would have to apply pass-on. Otherwise, it would be a double recovery; would there not?

MR. SPIEGEL: No. Becuase the defendant is gone. There's no such thing here as double recovery or double liability. The defendants are gone.

• • • •

MR. CANTANIA: May it please the Court, Tom Catania on behalf of the State of Minnesota.

I just want to give your Honor a couple of facts so that you have the whole picture.

What the State of Minnesota has done is on our core testing reports which indicate both the manufacturer who supplied the cement and the contractor who put it in for us, we have examined the claims submitted by — through claims processing the individual claimants. And wherever a claimant, a contractor submitted a claim who also did work on state projects, whether or not that person may have submitted a claim based on the work for the State of Minnesota or not, we removed that particular claim from our claim form. So we have only submitted claims for projects where we know that the contractor who did the installation has not submitted a claim at all.

So, for our purposes, we don't think there would be a pass-on issue raised.

The second —

THE COURT: Well, under Illinois Brick, who has the claim?

MR. CATANIA: We will under our state law.

THE COURT: No, under Illinois Brick who has the claim?

MR. CATANIA: Well, your Honor, under Illinois Brick a direct purchaser is a person entitled to make the claim.

THE COURT: Okay.

Under the Minnesota law, I guess it does not make any difference whether or not the contractor makes the claim; does it?

MR. CATANIA: No. There is a second sentence in the Minnesota law that says in any subsequent proceeding the Court shall make every effort to avoid duplicate recovery.

THE COURT: Well, so I say it makes a difference if the contractor makes a claim. There has to be a so-called pass-on trial; does there not?

MR. CATANIA: We thought it might make some difference, your Honor, and that is why we didn't submit claims for any projects where a Minnesota — the contractor did submit a claim.

THE COURT: All right.

MR. CATANIA: We took those out.

The only other point I would make, your Honor, is I would echo Mr. Spiegel's comment about the settlement fund being generated in large part or significant part by the states' willingness to compromise the indirect claims.

Mr. Cooper could also confirm that in the case of the Northwestern settlement — they sell a substantial amount of cement into the State of Minnesota — they were particularly concerned it would not enter into the settlement until they received assurances that our state claim would be compromised.

THE COURT: All right.

MR. CATANIA: Thank you.

• • • •

APPENDIX L

Excerpt from the Report of the Council of the District of Columbia, dated October 8, 1980, concerning Bill 3-107, the District of Columbia Antitrust Act of 1980 (subsequently codified after *congressional* review at D.C. Rev. Stat. §§ 28-4501 et seq).

Section 28-4509 athorizes indirect purchasers to recover damages for injuries proven pursuant to sections 28-4507 and 28-4508 above.

In 1968, the Supreme Court held in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), that a direct purchaser who paid an illegally high price for a product as a result of an antitrust violation could receive, under section 4 of the Clayton Act, three times the full amount of the overcharge by way of "treble damages," notwithstanding the interjection by the defense of the argument that the direct purchaser had in fact passed on the overcharge to its customers.

In *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), the case involved claims brought by indirect purchasers. The Supreme Court, confronted by the ruling in *Hanover Shoe, supra*, that direct purchasers could receive full recovery for overcharges passed on through higher prices to customers further down the distribution chain, ruled those subsequent customers, or indirect purchasers, were entitled to no recovery even though they ultimately had paid the overcharges resulting from the antitrust violation.

Illinois Brick has engendered substantial criticism, commencing with the dissenting opinion of Mr. Justice Brennan joined by Justices Marshall and Blackman. See 91 *Harv. L. Rev.* 221 (1977). Section 28-4509(a) makes clear that indirect purchasers can indeed seek damages

for overcharges resulting from antitrust violations which are proven to have been passed on to them.

Your committee has especially regarded the potential for unfairness against an erring defendant by duplication of recovery of damages. In light of the fact that treble damages can be assessed against one defendant on behalf of both direct and indirect purchasers, subsection (a) alone could punish defendants beyond reasonable capacity. Accordingly, subsections (b) and (c) of section 28-4509 borrow from provisions in the Hawaii laws, section 480-13(c), Hawaii Rev. Stat. These subsections allow a defendant sued by both direct and indirect purchasers to have a defense regarding passed on overcharges so that duplication of damages will be avoided. Apportionment of damages among direct and indirect purchaser plaintiffs "to obtain substantial fairness" also is permitted. It is your committee's intent that the courts, in apportioning and specifying the timely pay-out of damages, give consideration to a party who has taken the lead or has been most effective in pursuit of the interest of consumers.[1] It is also the intent of this section that total damages be limited to a threefold maximum to the extent that such maximum recovery may be accomplished without depriving a wronged party of his or her compensatory damages. However, it is a fact that in a suit in federal court, direct purchasers may have been allowed treble damages in full while indirect purchasers in the same chain of distribution are without a remedy. In such cases, section 28-4509 should be interpreted to allow local indirect purchasers suing under this act to recover at least the full measure of

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[1]For example, delay in the disbursement of damages to a local plaintiff may be required pending final disposition of a portion of a claim against a defendant arising out of the same or overlapping transaction(s) in a court of another jurisdiction.

their compensatory damages. The defendant in the described federal case then is left to suffer fourfold damages if federal treble damage legislation is pre-emptively cumulative to any District antitrust damage remedies.

APPENDIX M

PARTIES TO THE PROCEEDING BELOW

State of Arizona
Bill Carson
Smith and Green Corp.
Rubenstein Development Co.
Estes Homes
The Leavell Company
ARC Corp.
Hechinger Company
Katterjohn, Inc.
Wooldridge Construction Co.
York Concrete Co., *et al.*
Walter K. Laursen, *et al.*
Picou's Builders Supply, Inc.
State of Colorado
Perry, *et al.*
City of Austin
State of Oregon
Blankenship Builders, Inc.
Northern Materials, Inc.
State of Kansas
Smith & Green Corp.
Colorado Concrete Mfg. Co.
State of California
Edward W. Bergquist
State of Missouri
State of New Mexico
State of Utah
State of Nebraska
John Talley and
John Talley, Inc.
State of Louisiana
State of Alabama
State of Minnesota
State of Texas
State of Florida
Ballenger Corporation
Washington Public Power
Supply System
Arizona Public Service
Company
Bromely & Sons Concrete, Inc.
Keith and Sons, Inc.
New Jersey Lumber and
Building Materials
Dealer's Association
Packaged Concrete, Inc.
Formigli Corporation
City of Mountain Home
Arizona Slump Block, Inc.

Class Members-Appellees

Allied Concrete, Inc.
Allied Concrete &
Materials, Inc.
Chandler Ready-Mix Company
Columbia Building
Materials, Inc.
Johnson & Stewart
Materials, Inc.
Mesa Sand & Rock
New Pueblo Materials, Inc.
Phoenix Sand & Rock
The Tanner Companies
Tri-City Ready Mix, Inc.
Union Rock & Materials, Inc.
McBride & Son Companies
Herr Lumber, Inc.
Fabcon, Inc.
M.P.S. Industries, Inc.
Monnah Park Block Co., Inc.

A-170

I.E. Shilling Co.
Robert B. Hertel
General Paving Co.
County of Los Angeles

Flood Control District
of Los Angeles County
American Pacific Pipe

MOTION

Supreme Court, U.S.
FILED
JUL 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1862

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF CALIFORNIA, *et al.*,

Appellants,

vs.

ARC AMERICA CORPORATION, *et al.*,

Appellee.

On Appeal From The United States Court of Appeals For The Ninth Circuit

---

MOTION OF APPELLEE ARC AMERICA CORPORATION TO DISMISS OR AFFIRM

GIBSON, DUNN & CRUTCHER
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Counsel for Appellee

*Counsel of Record

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Whether state statutes providing for recovery of antitrust damages by indirect purchasers are preempted by the federal antitrust laws where those state laws increase the costs, diffuse the benefits, and inject difficulties, uncertainties, complexities and delays into the effective enforcement by private parties of the federal antitrust laws.

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MOTION OF APPELLEE ARC AMERICA CORPORATION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court, Appellee ARC America Corporation ("ARC America") hereby moves the Court for an order dismissing the appeal in this case or, in the alternative, for an order affirming the decision of the United States Court of Appeals for the Ninth Circuit. As explained herein, the decision below that state indirect purchaser statutes stand as an obstacle to the accomplishment of the full purposes and objectives of federal law and are thus preempted by federal antitrust laws is required by controlling authority of this Court. Therefore, because of the correctness of the Ninth Circuit decision and the consequent lack of a substantial federal question, the decision below should be affirmed or, in the alternative, this appeal should be dismissed.

STATEMENT OF THE CASE

Purchasers of cement and cement-containing products have engaged in coordinated litigation in the United States District Court for the District of Arizona, MDL Docket No. 296-PHX-MLR, seeking the recovery of treble-damages for violations of the price-fixing provisions of Section 1 of the Sherman Act, 15 U.S.C. § 1. Seven of the defendants have entered into settlements whereby payments aggregating over $32 million have been paid into a fund to be allocated among plaintiff classmembers. *In re Cement and Concrete Antitrust Litigation*, 817 F.2d 1435, 1438 (9th Cir. 1987), *pet. for reh. and sug. for reh. en banc denied*, No. 84-2865, slip op. (9th Cir. Feb. 9, 1988).

In 1984, the District Court undertook the task of creating a plan to distribute the settlement fund among the claimants who were members of the originally designated classes. 817 F.2d at 1438. The court ultimately ordered the distribution of the fund in Pretrial Order No. 122, entered January 23, 1985. Jurisdictional Statement ("Juris. Stat."), App. B.

Appellee ARC America was a direct purchaser of cement from the setting defendants, and is a member of one of the designated classes entitled to a share of the settlement fund. Arizona, California, Minnesota and Alabama ("States"), appellants herein, seek to reach into this settlement fund to recover damages claimed by the States as *indirect* purchasers of cement and cement-containing products. The District Court and the Ninth Circuit rejected claims by such indirect purchasers to portions of the settlement fund. In Pretrial Order No. 122, the District Court held in pertinent part:

> Claims will not be allowed for indirect purchases of cement or cement-containing products unless such claims fall within one of the presently recognized exceptions to the rule enunciated by the Supreme Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The indirect purchaser claims advanced . . . pursuant to . . . state statutes which purport to authorize recovery for indirect purchases are disallowed. Such statutes are clear attempts to frustrate the purposes and objectives of Congress, as interpreted by the Supreme Court in *Illinois Brick*, and, accordingly, *are preempted by federal law.*

Juris. Stat., App. B at A-30 to A-31 (emphasis in original).

The Ninth Circuit affirmed the District Court's decision. After examining this Court's decisions in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the Ninth Circuit held that "the state law claims in this case based on indirect purchases of cement that do not fall within any exception to the rule of *Illinois Brick* are preempted because they stand 'as an obstacle to the accomplishment of the full purposes and objectives' of federal antitrust law." 817 F.2d at 1447.

The States have appealed from this decision.

INTRODUCTION

The central issue in this case is simply stated: the appellant States have enacted statutes which provide that *indirect* purchasers who claim injury as a consequence of action taken by upstream sellers in violation of state antitrust laws are entitled to recover damages sustained as a result of such violation. Ala. Code § 6-5-60; Ariz. Rev. Stat. Ann. § 44-1408A; Cal. Bus. & Prof. Code § 16750(a); Minn. Stat. § 325D.57.[1] These "indirect purchaser" statutes, by allowing damage recovery to those who are not direct purchasers from antitrust violators, are inconsistent with the federal antitrust laws as those laws have been authoritatively interpreted by this Court in *Illinois Brick*. *Illinois Brick* holds that Section 4 of the Clayton Act, 15 U.S.C. § 15, precludes recovery of such damages by indirect purchasers except under specific, narrowly tailored circumstances not directly relevant in this appeal. *See* note 8 *infra*.

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[1] Other jurisdictions have enacted similar indirect purchaser statutes. *See generally*, Juris. Stat. at 8 n.3.

The rationale underlying the *Illinois Brick* decision is threefold. First, permitting recovery of antitrust damages by indirect purchasers would create an unacceptable risk of multiple, duplicative and overlapping recoveries for the same overcharge, contrary to the damage recovery scheme established by Congress in Section 4 of the Clayton Act. 431 U.S. at 730-31 & n.11. Second, opening private antitrust treble-damage actions to indirect purchasers would result in massive complications, delays and prohibitive costs, which in turn would result in significantly less effective private enforcement of the antitrust laws. *Id.* at 737-44. Third, indirect purchaser participation would dilute the recoveries available to direct purchasers, reducing their incentives to bring private actions and thus defeating a fundamental purpose of Section 4 of the Clayton Act to encourage private enforcement of federal antitrust laws. *Id.* at 745-47.

State indirect purchaser statutes authorize claims that present the same problems as those identified by this Court in *Illinois Brick* in rejecting indirect purchaser recovery under federal antitrust law. These statutes give rise to a proliferation of competing claims to limited resources; they inject complex legal, factual and procedural issues into private enforcement actions, thereby making such claims less efficient and effective; and they diminish the value of private enforcement actions by direct purchasers, thus weakening the incentive of private parties to pursue viable antitrust claims.

Both the District Court and the Court of Appeals recognized and agreed with this Court's determination in *Hanover Shoe* and *Illinois Brick* that the "effectiveness of the [federal] antitrust treble-damages action would be substantially reduced by adopting a rule that any party in the chain [of manufacture or distribution] may sue to recover the fraction of the overcharge allegedly absorbed by it." *Illinois Brick*, 431 U.S. at 729. Both the District Court and the Ninth Circuit found that appellants' indirect purchaser laws adopted precisely such rules and that they would have an identical impact on federal antitrust enforcement as that described by this Court in *Hanover Shoe* and *Illinois Brick*. Both courts thus properly held that the Supremacy Clause[2] requires that state laws having such deleterious effects on federal law be preempted.[3]

I

PREEMPTION OF STATE LAW UNDER THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION

This Court has held that state laws are preempted by federal law where, *inter alia*, "the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See CTS Corp. v. Dynamics Corp. of America*, 107 S. Ct. 1637, 1644 (1987). *See also Silkwood v. Kerr-McGee*

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[2] Article VI of the Constitution reads, in relevant part:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof, . . . shall be the supreme Law of the Land, . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[3] The determinations by the two courts below concerning the impact of state law indirect purchaser claims on the effectiveness and efficiency of federal private treble-damage actions are entitled to some deference by this Court. *Cf., Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617, 2623 (1987); *Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

Corp., 464 U.S. 238, 248 (1984); *Lawrence County v. Lead-Deadwood School District*, 469 U.S. 256, 260 (1985); *Hayfield Northern Railroad Co., Inc. v. Chicago & North Western Transportation Co.*, 467 U.S. 622, 632 (1984).

Preemption of concurrent state regulation does not require explicit congressional expression of an intent to displace state law or create federal exclusivity; preemption can occur by implication. For example, preemption of state law "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Indeed, in determining whether state law impedes, frustrates or imposes barriers to the intended goals or operations of a federal statute, the Court must "consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." *Id.* at 526.[4]

The federal courts thus will, and should, strike down state antitrust statutes and analogous economic regulations that conflict with federal antitrust laws. For example, the Court has recognized that, because major league baseball's reserve system is immunized from the application of federal antitrust law, conflicting state antitrust regulation of the activities of organized

[4] "Preemption may be either express or implied." *Fidelity Fed. Sav. and Loan Assn. v. De La Cuesta*, 458 U.S. 141, 152-53 (1982). The benefits of the federal law, likewise, may not be denied by the state law, *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942), and the perceived importance to the state of its own law is immaterial when that state law conflicts with federal law, *Fidelity Fed. Sav. & Loan Assn. v. De La Cuesta*, 458 U.S. at 153.

baseball is preempted. *Flood v. Kuhn*, 407 U.S. 258, 284-85 (1972) (adopting district court's finding of preemption). Similarly, in rejecting the application of a state doctrine of estoppel to foreclose a federal antitrust challenge to a licensing agreement, this Court has held that conflicting state law and policy must yield to the overriding federal policy. *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 176 (1942). *See also Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968) ("we cannot accept the Court of Appeals' idea that courts have power to undermine the antitrust acts" by permitting the assertion of a state common law defense).[5]

II

STATE INDIRECT PURCHASER LAWS ARE AN OBSTACLE TO THE EFFECTIVE ENFORCEMENT OF FEDERAL ANTITRUST LAWS

A. The Purposes and Objectives of the Federal Treble-Damage Remedy

Section 4 of the Clayton Act provides a right to recover treble-damages to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. . . ." 15 U.S.C. § 15. Two decisions of this Court have determined the impact of indirect purchaser claims on the purposes and goals of the treble-damage remedy under the federal antitrust laws.

[5] *See also Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231 (1964), where the Court held a state unfair trade practice law preempted because the state could not, under its unfair competition law, "give protection of a kind that clashes with the objectives of the Federal patent laws."

The first, *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), involved a claim by a federal antitrust defendant that a plaintiff had not been damaged by the defendant's alleged overcharge because the plaintiff passed on the overcharge to its customers. This Court "rejected this assertion of the so-called 'passing-on' defense." *Id.* at 488. After reviewing the economic and evidentiary intricacies necessary to establish whether, how, and to what extent the many levels of market participants might have increased their prices as the result of upstream restraints on the market, the Court concluded that such an inquiry—in the already complex field of antitrust treble-damage actions—"would often require additional long and complicated proceedings involving massive evidence and complicated theories." *Id.* at 493. The ultimate consumer, upon whom the overcharge would come to rest under this passing-on theory, "would have only a tiny stake in a lawsuit and little interest in attempting a class action." *Id.* at 494. The Court concluded that the overwhelming complexities associated with the passing-on theory would "substantially reduce[] [the] effectiveness" of treble-damage actions. *Id.*

Nine years later, in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), this Court was asked to determine whether the passing-on theory could be used *offensively* to enable indirect purchasers to recover damages resulting from overcharges allegedly passed on to them through direct purchasers of price-fixed goods. *Illinois Brick* was a treble-damage suit brought by some 700 governmental entities that had purchased concrete blocks "indirectly" by way of their inclusion in general contracting bids for public improvements. Plaintiffs claimed that a price fixing conspiracy by the manufacturers of these concrete blocks had increased the prices ultimately paid by these entities, through their contractors, for public improvements. The Court held that this attempted offensive use of the passing-on theory could not be reconciled with *Hanover Shoe*. *Id.* at 728.

Three principal concerns—premised on Congress' goal of effective antitrust enforcement—were identified by the Court in rejecting indirect purchaser damage claims in federal antitrust suits: (1) the risk of multiple liability; (2) the danger of overly complex and costly litigation; and (3) the disincentives created for private enforcement of the federal antitrust laws.

1. Risk of Multiple Liability

First, the Court found that "allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants." *Id.* at 730. This risk of "unwarranted multiple liability" would come about "by *presuming* that one plaintiff (the direct purchaser) is entitled to full recovery while preventing the defendant from using that presumption against the other plaintiff; overlapping recoveries are certain to result from the two lawsuits unless the indirect purchaser is unable to establish any pass-on whatsoever." *Id.* at 730-31 (emphasis in original). The Court flatly declared itself "unwilling to 'open the door to duplicative recoveries' under § 4." *Id.* at 731, quoting *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 264 (1972). In fact, the Court stressed that the risk of even "a little slopover [of duplicative damages] on the shoulders of the wrongdoers" is unacceptable. 431 U.S. at 731 n.11.

Illinois Brick's rejection of the possibility of multiple liability was premised on the decision in *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251 (1972), in which this Court's refusal to allow potential multiple liability under the Clayton Act was based specifically on an evaluation of congressional intent in establishing damage remedies under the federal antitrust laws. 405 U.S. at 262-66. This principle has been reaffirmed by this Court on two more occasions since its decision in *Illinois Brick*. *See Associated General Contractors, Inc. v. Carpenters*, 459 U.S. 519, 544 (1983) (plaintiffs lacking "antitrust standing" cannot sue for damages under the federal antitrust law because they could assert "conflicting claims to a common fund, the amount of the alleged overcharge, thereby creating the danger of multiple liability for the fund"); *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 474-75 (1982) (reaffirming *Illinois Brick's* concern that multiple antitrust liability would unacceptably splinter and burden enforcement of the federal antitrust laws).

The States do not dispute the Ninth Circuit's finding, 817 F.2d at 1446, of an "unequivocal" federal policy against multiple liability. They respond only that "defendants' liability was fixed by the settlement," and that they are thus not exposed to this possibility of multiple liability. Juris. Stat. at 19. Even if true as to the seven *settling* defendants in this case, this argument is irrelevant to the Court's preemption analysis. Appellants' claims to the settlement fund in this case depend upon the validity of state statutes that are fundamentally irreconcilable with federal law. These statutes either are contrary to federal law or they are not, even if in some circumstances the conflict between the federal and state regimes may be less severe than in others. *See* note 9 *infra*. Moreover, the States' assertion ignores the fact that the District Court's decision left open the right of non-settling plaintiffs to pursue claims against non-settling defendants, thus giving rise to a real potential for multiple recovery under the existing indirect purchaser statutes.

2. Indirect Purchaser Recovery Overly Complicates Antitrust Damage Actions and Reduces Effective Enforcement

The second basis for the holding in *Illinois Brick* was that indirect purchaser suits would undercut *Hanover Shoe's* holding that the purposes underlying the Clayton Act require the avoidance of intolerable "costs to the judicial system" in order to promote "efficient enforcement of the antitrust laws." 431 U.S. at 732. The economic inquiry necessary to allocate the damages according to the extent they were passed on beyond the first level "would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness." *Id.* at 737. The Court was unwilling to impute to Congress an intent to complicate antitrust enforcement in this manner.

The States erroneously contend, Juris. Stat. at 12-13, that the Court's concern in the foregoing cases was limited to matters of judicial *administration*, and did not extend to the meaning, purpose and intent of Congress in creating private damage remedies under the antitrust laws. This argument ignores the clear and repeated emphasis in the Court's analysis in *Hanover Shoe* and *Illinois Brick*. *Hanover Shoe* stressed that the complications inherent in permitting a pass-on defense go to the core of the "effective-

ness" of treble-damage actions. 392 U.S. at 494. Applying the principles announced in *Hanover Shoe*, this Court in *Illinois Brick* added: "We are no more inclined than we were in *Hanover Shoe* to ignore *the burdens that such an attempt would impose on the effective enforcement of the antitrust laws.*" 431 U.S. at 741 (emphasis added). Thus, the issue of impossibly complicated litigation addressed in *Hanover Shoe* and *Illinois Brick* was solely related to the manifest goal of Congress to assure effective *enforcement* of the federal antitrust laws.[6] The Ninth Circuit properly considered this point in arriving at its holding below. 817 F.2d at 1444-45.[7]

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[6] The States' reliance (Juris. Stat. at 13), as well as similar reliance by *Amici*, (*see* Brief of Twenty States and the District of Columbia As Amici Curiae in Support of Appellants' Jurisdictional Statement ("Amici Brief") at 14-15), on this Court's decision in *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982), is misplaced because that decision supports, rather than undercuts, the Ninth Circuit's decision on this point. While the quoted language properly recognizes that the treble-damage remedy in the Clayton Act contains little in the way of restrictive language, it goes on to stress Congress' remedial purpose in enacting the law and its principal desire to establish an effective "private enforcement mechanism." In view of such language, it is implausible to conclude that the concerns expressed in *Illinois Brick* regarding the tendency of complex of lawsuits to diminish the effective enforcement of the antitrust laws were limited to keeping the Court's docket clear.

[7] Appellant's effort to disparage the Ninth Circuit's decision by arguing that it "comes dangerously close to the idea that [the Supreme] Court can, on its own, preempt state laws under the Constitution" (Juris. Stat. at 13 n.5) is sophistry. The Ninth Circuit's decision rests upon the principle articulated in *Marbury v. Madison*, 1 Cranch 173, 177 (1803), that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *See also Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("the interpretation of the [federal law] enunciated by this Court . . . is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States '*any Thing in the Constitution or Laws of any State to the Contrary notwithstanding*' "). (Emphasis added.)

3. Indirect Purchaser Recovery Reduces Incentives For Private Enforcement

Finally, *Illinois Brick* rejected the argument that downstream treble-damage plaintiffs should be permitted to recover antitrust damages in order to deprive defendants of "the fruits of their illegality." 431 U.S. at 733. Again, the Court observed that the very reason *Hanover Shoe* had prohibited inquiries into the passing-on of price fixing overcharges was to facilitate *enforcement* of the federal antitrust law. The Court referred to its "concern in *Hanover Shoe* for the effectiveness of the treble-damages remedy," 431 U.S. at 734-35, and concluded that:

> on balance, and until there are clear directions from Congress to the contrary, we conclude that the legislative purpose in creating a group of "private attorneys general" to enforce the antitrust laws under § 4 . . . is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it.

431 U.S. at 746.

The States' response to this Court's conclusion that indirect purchaser actions would result in "increasing the costs and diffusing the benefits of bringing a tre-

ble-damages action" (*id.* at 745) is simply to assert a contrary opinion: "The legislatures of 13 states and the District of Columbia have determined that the enforcement of their antitrust laws is best served by allowing both direct and indirect purchasers to recover their injuries." Juris. Stat. at 14. Inexplicably, the States argue that this presents no conflict, since both the federal and state regimes view private enforcement as a principal goal of the antitrust laws. This, of course, ignores the Court's conclusion that indirect purchaser damage recovery "could seriously impair this important weapon of antitrust enforcement." *Id.* The States may well be convinced that theirs is the better view, but it is for this Court to decide—as it already has—whether indirect purchaser claims would hamper the attainment of the objectives of the federal law.[8]

B. The States' Indirect Purchaser Laws, as Applied in This Case, Present Obstacles to the Accomplishment of the Objectives of Federal Law

The States argue that the Ninth Circuit's decision striking down the indirect purchaser statutes at issue

[8] The Court in *Illinois Brick* delineated two principal exceptions to the prohibition against indirect purchasers' suits. One such exception arises "where the direct purchaser is owned or controlled by its customer." 431 U.S. at 736 n.16. The other exception occurs in situations in which the indirect purchaser operates pursuant to a cost-plus, fixed quantity contract with the direct purchaser. 431 U.S. at 736. Under either of these exceptions, the Court observed, the problems otherwise associated with permitting indirect purchaser recovery do not exist. *Id.* at 732 n.12, 736. These limited exceptions to the *Illinois Brick* rule are not relevant in this proceeding, since the District Court's fund allocation decision expressly allowed claims by indirect purchasers who could demonstrate that they fit within such exceptions. Juris. Stat., App. B at A-30 to A-31.

was improperly premised on hypotheticals, and that the facts of this case present no conflicts with the holding of this Court in *Illinois Brick*. Juris. Stat. at 18-20. To the contrary, the facts of this case place the federal and state damage regimes in direct conflict with one another.[9] To require ARC America (and other direct purchaser claimants) to dilute its claim to a portion of the settlement fund by sharing this fund with indirect purchaser claimants whom the federal law specifically excludes would create precisely the problems that *Illinois Brick* sought to avoid.

First, recovery by indirect purchasers narrows the anticipated recovery of the direct purchasers. Thus, rather than furthering the goals of encouraging private enforcement of antitrust laws by concentrating recoveries in direct purchasers, this outcome produces precisely the opposite result. It also sends a clear, unmistakable signal to future potential direct purchaser plaintiffs that their recovery in antitrust actions may well be diminished whenever parallel state laws permit indirect purchaser recovery. Instead of promoting private enforcement by direct purchasers—a clear goal of Congress in enacting Section 4 of the Clayton Act—application of the states' indirect purchaser statutes *in this case* directly undercuts the incentives of antitrust plaintiffs to pursue recovery

[9] The States' suggestion that this particular case presents few of the concerns addressed by the Court in *Illinois Brick*, even if true, would seem irrelevant. This Court set forth a rule of law in *Illinois Brick* that applies regardless of the fact that "these difficulties and uncertainties will be less substantial in some contexts than in others." 431 U.S. at 743. *See also, id.* at 724, 727 (passing-on theory rejected "as a matter of law").

for antitrust violations that arise both under state and federal law.[10]

Second, permitting indirect purchasers to share in the settlement fund in this case does not avoid the highly complicated economic analysis that the lower court will need to undertake—in allocating the fund—to determine the nature, extent and ultimate effect of pass-ons with respect to each different indirect purchaser, at each level of commerce. All of the unfathomable depths of analysis that *Hanover Shoe* and *Illinois Brick* warned would be inconsistent with the enforcement goals of the federal antitrust laws remain unabated if indirect purchasers are allowed to participate in the settlement fund.

Nor do the dubious assurances of the States that their own factual circumstances avoid the need for complex analysis respond to this concern; the States are not the only indirect purchasers involved in this proceeding. Indeed, as this Court indicated in *Illinois Brick*, the task even of identifying all indirect purchasers is difficult, since products often travel through many levels of commerce and assume numerous different forms before finally coming to rest. 431 U.S. at 740-41 & n.23. *See also In re Western Liquid Asphalt Cases*, 487 F.2d 191, 200 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974). None of the problems

[10] Encouragement of private enforcement as a deterrent to potential antitrust violators is a principle that is firmly established by the decisions of this Court. In *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968), this Court stated that "the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws."

identified in *Illinois Brick* concerning the need to avoid embroiling the courts in labyrinthian mazes of economic analysis in such cases would in any manner be avoided if indirect purchasers were permitted to share in recovery of the settlement fund in this case.[11]

[11] The Amicus Curiae Briefs both of the United States and of the twenty States and the District of Columbia argue that state indirect purchaser statutes are not preempted since any conflict with the Clayton Act can be avoided by a federal courts' refusal to entertain pendent state indirect purchaser claims. Brief for the United States as Amicus Curiae at 14 n.15; Brief of Twenty States and the District of Columbia as Amicus Curiae at 14 n.6.

This argument fails for at least three reasons. First, it has absolutely no application to the present controversy in which the conflict is real, is tangible, and is evidenced by the present struggle between direct and indirect purchasers to the same limited settlement fund. That the existence of a conflict might be avoided in certain circumstances not present here is irrelevant to the issue—properly decided by the Ninth Circuit—of the existence of a preemptive conflict.

A second and related point is that acceptance of *amici*'s position on this question would effectively eliminate any and all potential for settlement of federal antitrust class action lawsuits, since no settlement could protect a defendant from potentially limitless state law actions by indirect purchasers. Indeed the settlement goal that permeates federal class action suits argues strongly *against* a federal court's refusal to entertain pendent state law claims, since any such refusal may well further complicate, rather than simplify, resolution of federal antitrust lawsuits.

Moreover, *Illinois Brick* itself rejects the argument of the *amici*, noting that suits by indirect purchasers "implicate[] all . . . of the interests that have traditionally been thought to support *compulsory joinder* of absent or potentially adverse claimants . . . ." 413 U.S. at 737-38 (emphasis added). The Court concluded that "even under the *optimistic* assumption that joinder of potential plaintiffs will deal satisfactorily with problems

In this setting, the state laws must give way. The record makes plain that the appellants have sought to undo legislatively the decision of this Court in *Illinois Brick*—something that Congress itself has not done in the decade since *Illinois Brick* was decided. Absent such action by Congress, the goals identified by this Court as underlying the treble-damage provision of the federal antitrust laws remain unchanged. The Ninth Circuit was entirely correct in rejecting the States' efforts to undercut these congressional goals.

III

THERE IS NO CONFLICT OF FEDERAL AUTHORITY ON THIS ISSUE

Contrary to the States' contention, the decision of the Ninth Circuit is not "in direct conflict" with any existing federal court decision. The States argue that the Ninth Circuit's decision directly conflicts with the Fifth Circuit's opinion in *In re Chicken Antitrust Litigation*, 669 F.2d 228 (5th Cir. 1982). Only a very creative reading of *In re Chicken* could give rise to this conclusion, however, since the court in that case never addressed the Supremacy Clause question. Rather, the court in *In re Chicken* determined that indirect purchasers could share in an antitrust settlement fund where they had *expressly negotiated* for a *designated percentage* of the fund in connection with their release of claims that survived in the wake of

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of multiple litigation and liability, [allowing indirect purchaser recovery] would transform treble-damages actions into massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant." *Id.* at 740 (emphasis added).

Illinois Brick (*e.g.*, injunction claims under § 16 of the Clayton Act, or claims that came within the "cost-plus" or "owned or controlled subsidiary" exceptions delineated in *Illinois Brick*). The Fifth Circuit carefully avoided addressing the constitutionality of state indirect purchaser statutes.

At least three other courts, including one federal court, have squarely held that *Illinois Brick* precludes damage recovery by indirect purchasers under state law claims that have been joined with federal antitrust claims. *In re Wiring Device Antitrust Litigation*, 498 F. Supp. 79 (E.D.N.Y. 1980); *Tip Top Farms, Inc. v. Dairylea Cooperative, Inc.*, 497 N.Y.S.2d 99 (A.D. 2d Dept. 1985); *Russo & Dubin v. Allied Maintenance Corp.*, 407 N.Y.S.2d 617 (N.Y. 1978). The California state court decision in *Crown Oil Corp. v. Superior Court*, 177 Cal. App. 3d 604, 223 Cal. Rptr. 164, *reh'g. denied*, 177 Cal. App. 3d 614 (Cal. Sup. Ct. 1986), *appeal dismissed for want of jurisdiction sub. nom. Crown Oil Corp. v. Lapidus Popcorn, Inc.*, 107 S. Ct. 265 (1986), is an anomoly.

IV

CONGRESS HAS EVIDENCED NO INTENT TO SUPPORT INDIRECT PURCHASER RECOVERIES UNDER STATE ANTITRUST LAW

The States argue that the District of Columbia Antitrust Act of 1980, D.C. Code Ann. §§ 28-4501 *et seq.*, and the federal *parens patriae* legislation, 15 U.S.C. § 15c, enacted in 1976, demonstrate a shift in Congress' purpose toward indirect purchaser recovery. These enactments do not offer the States any such support. The relevant portion of the District of Columbia Act, D.C. Code Ann. § 28-4509, is but one

small element of a comprehensive antitrust regulatory scheme established in the District in 1980. Although this comprehensive bill—enacted by the District government and *not* by Congress—was forwarded to certain congressional committees, Congress took no affirmative action with respect to this legislative package which, as the States correctly point out, automatically became law without participation by Congress. It is therefore factually erroneous to state, as appellants have done, that Congress has "approved" the District of Columbia provision. Moreover, such inaction by Congress is hardly the "clear direction from Congress" that this Court in *Illinois Brick* deemed necessary to alter its conclusion that indirect purchaser recovery was incompatible with the enforcement goals of the antitrust laws. 431 U.S. at 746.

The States' reliance on the federal *parens patriae* statute, 15 U.S.C. § 15c, is even more misplaced; this same statute and its legislative history were advanced to this Court in *Illinois Brick* as supporting indirect purchaser recovery, and were squarely found not to support such recovery. 431 U.S. at 733-34 n.14 & 747 n.31. Since this statute was held not to affect the conclusion in *Illinois Brick* that indirect purchaser recovery was incompatible with Congress' goals in creating private treble-damage remedies, it is equally unavailing in this case.

CONCLUSION

While the states have broad power to regulate commerce and to provide remedies to victims of unfair trade practices, the exercise of such power cannot come at the expense of the effective enforcement of

federal laws. This Court, having already held that indirect purchaser statutes will "substantially reduce[]" the effectiveness of federal treble-damage antitrust actions, 431 U.S. at 729, should affirm the decision below, or should dismiss this appeal as having failed to raise any substantial federal questions.

July 1, 1988

Respectfully submitted,

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AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF CALIFORNIA, ET AL., APPELLANTS

v.

ARC AMERICA CORPORATION, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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25 pp

QUESTION PRESENTED

Whether Section 4 of the Clayton Act, 15 U.S.C. 15, construed by this Court in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), to bar treble damage actions by indirect purchasers under the federal antitrust laws, preempts state indirect-purchaser statutes.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1862

STATE OF CALIFORNIA, ET AL., APPELLANTS

v.

ARC AMERICA CORPORATION, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The United States has primary responsibility for enforcing the federal antitrust laws. Many States also have antitrust laws, which, like the federal statutes, seek to deter anticompetitive conduct. The question presented in this case is whether the Clayton Act, which has been construed to provide no remedy to "indirect purchasers" in most cases, should be construed to preclude the States from giving a remedy to indirect purchasers. Because that question is ultimately one of congressional intent underlying a statute that the United States enforces, and because the answer may affect federal antitrust enforcement, the United States has a particular interest in its correct resolution.

STATEMENT

1. In 1976 and 1977, 35 actions were filed in 12 federal district courts against numerous cement manufacturers alleging a nationwide conspiracy to fix prices of cement (J.S.

App. A3). Appellants—California, Minnesota, Alabama, and Arizona—filed four of those actions; each State sought to represent a class that included all the governmental entities within the State that had purchased cement or products containing cement (see *id.* at A63-A137). The States' complaints alleged violations of Section 1 of the Sherman Act, 15 U.S.C. 1, and state statutes. California, Minnesota, and Alabama sought recovery for indirect purchases of cement; they based those claims on state statutes that indisputably permit indirect-purchaser suits.[1] Arizona made a similar claim, but the question whether its statute permits indirect-purchaser suits is disputed (J.S. 9).[2]

In September 1977, all pending actions were transferred to the United States District Court for the District of Arizona for coordinated pretrial proceedings (J.S. App. A3). Earlier that year, this Court had issued its decision in *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977), holding that indirect purchasers have no claim under the federal anti-

[1] See Cal. Bus. & Prof. Code § 16750(a) (West 1987 & Supp. 1988) (action to recover "three times the damages sustained * * * may be brought by any person who is injured in his business or property * * * regardless of whether such injured person dealt directly or indirectly with the defendant"); Minn. Stat. Ann. § 325D.57 (Supp. 1988) ("[a]ny person * * * injured directly or indirectly * * * shall recover three times the actual damages sustained"); Ala. Code § 6-5-60(a) (1975) ("[a]ny person * * * injured or damaged by an unlawful trust, combine or monopoly, or its effect, direct or indirect, may, in each instance of such injury or damage, recover the sum of $500.00 and all actual damages"). The California and Minnesota statutes were enacted in response to this Court's decision in *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977). See *Union Carbide Corp.* v. *Superior Court,* 36 Cal. 3d 15, 19, 679 P.2d 14, 16, 201 Cal. Rptr. 580, 582 (1984).

[2] Ariz. Rev. Stat. Ann. § 44-1408 (1987) provides that the State or any other person "threatened with injury or injured in his business or property by a violation of this article may bring an action for * * * damages sustained."

trust laws for damages resulting from overcharges passed on to them by suppliers who purchased from members of an illegal conspiracy.

On March 9, 1979, the district court certified the actions as class actions and established three classes of cement purchasers.[3] The broadest of those three classes, the National Cement Class, consisted of all those who purchased cement during the relevant time period, other than the defendants and the members of the other two classes. J.S. App. A3.

All three cement-purchaser classes entered into settlements with several defendants between July 1979 and October 1981, creating a settlement fund in excess of $32 million (J.S. App. A4). The settlement agreements provided that the plaintiffs release all claims "of any nature whatsoever * * * pertaining to any direct or indirect purchase of cement or cement-containing products from any cement manufacturer or producer * * * which claims * * * are asserted under any federal or state antitrust or unfair competition or business law" (Calif. C.A. Br. 4; see J.S. App. A141, A153, A154-A155). The agreements also provided that the "allocation and distribution of the Settlement Fund shall be in accordance with the provisions of any agreements or plans approved by the [District] Court" (J.S. App. A11).

In subsequent proceedings involving distribution of the fund, direct purchasers challenged the States' rights to be compensated for their indirect purchases of cement, relying on *Illinois Brick.* In January 1985, the district court disallowed the claims of indirect purchasers. It held that the state statutes on which the indirect purchasers' claims were based were preempted by the Clayton Act, as interpreted by *Illinois Brick.* J.S. App. A30-A31.

[3] The district court also certified a class of entities that purchased ready-mix concrete for delivery within the State of Arizona (J.S. App. A3).

2. On appeal to the Ninth Circuit, the States argued that this Court's decision in *Illinois Brick* to disallow indirect purchaser suits under the federal statutes did not represent a congressional policy to foreclose the States from providing antitrust remedies to indirect purchasers.[4] The court of appeals affirmed the denial of the indirect-purchaser claims on the basis of *Illinois Brick*. The court reasoned that such claims would "complicate antitrust enforcement" (J.S. App. A21); "could also limit the recoveries of direct purchasers and thus reduce their incentives to bring antitrust actions" (*id.* at A22); and would "conflict most directly with federal policy because they create the risk of multiple liability for defendants" (*id.* at A22-A23). The court of appeals reasoned that it was "bound by the Supreme Court's pronouncements" concerning the policy against multiple liability (*id.* at A23).

DISCUSSION

Appellants have properly invoked this Court's appellate jurisdiction under 28 U.S.C. 1254(2).[5] In our view, the

[4] The States also asserted that, since the release of state indirect-purchaser claims had formed part of the inducement of the defendants to settle, indirect purchasers should not, as a matter of contract law, be precluded from sharing in the settlement fund. The court of appeals rejected that claim (J.S. App. A25-A26), and it is not at issue on this appeal.

[5] The decision of the court of appeals invalidates, under the Supremacy Clause, the state indirect-purchaser statutes at least as applied to this case. "[I]t is sufficient for § 1254(2) appeal purposes that the state law was held unconstitutional as applied to the facts of the case." R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 52 (6th ed. 1986) (citing *Dutton* v. *Evans*, 400 U.S. 74, 76 n.6 (1970); *Malone* v. *White Motor Corp.*, 435 U.S. 497, 499 (1978)). This case is not like *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984), and *California Coastal Comm'n* v. *Granite Rock Co.*, No. 85-1200 (Mar. 24, 1987), in which the Court held that it lacked appellate jurisdiction, where lower courts had invalidated state actions taken pursuant to state

question presented is substantial, and the decision below is wrong.

In *Illinois Brick*, the Court construed the Clayton Act as not permitting indirect purchasers to recover damages under that statute in most circumstances. We agree that this construction best serves the public interest in effective antitrust enforcement. But the States, many of which have their own antitrust laws, may have different views about effective enforcement and may adopt different enforcement policies and remedies unless Congress has required uniformity.

In a decision that conflicts with the one other appellate decision squarely in point[6] and with the views of most commentators,[7] the court of appeals here held state law invalid even though there is no evidence of a congressional intent to preempt. This decision, which invalidates the laws of at least three (possibly all four) appellant States and casts

statutes but, in each case, "the statute * * * [had been] left untouched" (*Silkwood*, 464 U.S. at 247).

[6] *Crown Oil Co.* v. *Superior Court*, 177 Cal. App. 3d 604, 223 Cal. Rptr. 164 (1986), appeal dismissed, No. 86-287 (Oct. 14, 1986). State indirect-purchaser statutes also were assumed to be valid, without any mention of preemption, in *In re Chicken Antitrust Litigation*, 669 F.2d 228, 238-239 (5th Cir. 1982), and were stated in dicta not to be preempted in *In re Sugar Antitrust Litigation*, 588 F.2d 1270, 1273 (9th Cir. 1978), cert. denied, 441 U.S. 932 (1979). The preemption question was discussed but not resolved in *Union Carbide Corp.* v. *Superior Court*, 36 Cal. 3d at 24 & n.3, 679 P.2d at 20 & n.3, 201 Cal. Rptr. at 586 & n.3.

[7] See Note, *Indirect Purchaser Suits Under State Antitrust Laws: A Detour Around the* Illinois Brick *Wall*, 34 Stan. L. Rev. 203 (1981); Note, *State Indirect Purchaser Statutes: The Preemptive Power of* Illinois Brick, 62 B.U.L. Rev. 1241 (1982); Floyd, *Control of Break-Away State Antitrust Litigation: An Issue of Federalism*, 35 Hastings L.J. 1, 16 & n.107, 45 (1983); Comment, *The California Legislature Steers the Antitrust Cart Right off the* Illinois Brick *Road*, 11 Pac. L.J. 121, 126-127 (1979).

doubt on the validity of laws adopted by at least 12 other jurisdictions,[8] erroneously turns policy considerations that led this Court to a particular construction of a federal statute into federal barriers to contrasting state approaches.

1. "The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." *Louisiana Public Service Comm'n* v. *FCC*, 476 U.S. 355, 369 (1986); see also *California Federal Savings & Loan Ass'n* v. *Guerra*, No. 85-494 (Jan. 13, 1987), slip op. 7. "[I]n any pre-emption analysis, ' "[t]he purpose

[8] At least 12 other jurisdictions have indirect-purchaser statutes, like those of California, Minnesota, and Alabama, that expressly give indirect purchasers standing to sue. Colo. Rev. Stat. § 6-4-106 (1974 & Supp. 1987); D.C. Code Ann. § 28-4509(a) (1981); Hawaii Rev. Stat. § 480-14 (1984); Ill. Ann. Stat. ch. 38, ¶ 60-7 (Smith-Hurd Supp. 1988); Kan. Stat. Ann. § 50-801(b) (Supp. 1987); Md. Com. Law Code Ann. § 11-209 (1983 & Supp. 1987); Mich. Comp. Laws Ann. § 445.778 (West Supp. 1987); Miss. Code Ann. § 75-21-9 (1973); N.M. Stat. Ann. § 57-1-3(A) (Supp. 1987); R.I. Gen. Laws § 6-36-12(g) (1985); S.D. Codified Laws Ann. § 37-1-33 (1986); Wis. Stat. Ann. § 133.18 (West Supp. 1987). Other jurisdictions have statutes, like that of Arizona, that could be interpreted to permit indirect purchaser suits, but they generally appear to be interpreted to preclude recovery by indirect purchasers, following this Court's reasoning in *Illinois Brick*. See *In re Wiring Device Antitrust Litigation*, 498 F. Supp. 79, 87 (E.D.N.Y. 1980) (construing South Carolina law); *Russo & Dubin* v. *Allied Maintenance Corp.*, 95 Misc. 2d 344, 407 N.Y.S.2d 617 (Sup. Ct. 1978); *Commonwealth of Massachusetts* v. *Massachusetts CRINC*, 1984-1 Trade Cas. (CCH) ¶ 66,057, at 68,684 n.7 (Mass. 1984); *Keating* v. *Philip Morris, Inc.*, 417 N.W.2d 132, 136 (Minn. Ct. App. 1987) (following *Illinois Brick* in suits based on pre-1984 statute that did not contain express indirect-purchaser provision); see also *Tip Top Farms, Inc.* v. *Park Lane Dairies, Inc.*, 114 A.D.2d 12, 16, 497 N.Y.S.2d 99, 101 (1985) (dismissing indirect purchasers' suits based on "breach of contract or for money had and received" by indirect purchasers against direct purchasers who had recovered antitrust damages, reasoning that "recovery would undermine overriding Federal antitrust policies"), aff'd, 69 N.Y.2d 625, 503 N.E.2d 692, 511 N.Y.S.2d 227 (1986), cert. denied, No. 86-1484 (Apr. 27, 1987).

of Congress is the ultimate touchstone." ' " *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724, 747 (1985) (citations omitted); see *Fort Halifax Packing Co.* v. *Coyne*, No. 86-341 (June 1, 1987), slip op. 6. Thus, federal law will preempt state law only when Congress has expressly chosen to occupy a given field; when a scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress left no room for state regulation; or when state law is in actual conflict with federal law (*Guerra*, slip op. 7).

The Sherman and Clayton Acts contain no statement of congressional intent to preempt state antitrust remedies. Nor have they ever been understood to occupy the field of antitrust law. The regulation of business practices stems from the common law and has traditionally been undertaken by the States.[9] The Sherman Act was intended to supplement, not to displace, the States' efforts to control "dangerous combinations." 21 Cong. Rec. 2456 (1890) (remarks of Sen. Sherman). As this Court noted in *Southern Motor Carriers Rate Conf., Inc.* v. *United States*, 471 U.S. 48, 56 n.19 (1985), statements in the legislative history affirmatively express a desire not "to invade the legislative authority of the several States." See H.R. Rep. 1707, 51st Cong., 1st Sess. 1 (1890). See generally *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 632-634 (1976) (Stewart, J., dissenting). Thus, the States retain extensive authority to legislate in the antitrust field. *Watson* v. *Buck*, 313 U.S. 387, 403 & n.6 (1941); 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 208, at 58 (1978); see *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 133 (1978); see also *Puerto Rico* v. *Shell Co.*, 302 U.S. 253

[9] In 1890, 21 States had their own antitrust laws. Mosk, *State Antitrust Enforcement and Coordination with Federal Enforcement*, A.B.A. Sec. Antitrust L. Proc., Aug. 6-10, 1962, at 358, 363.

(1937) (Section 3 of the Sherman Act (15 U.S.C. 3) does not preempt similar Puerto Rican antitrust law).[10]

As the Court said in *Parker* v. *Brown,* 317 U.S. 341, 351 (1943), "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's [regulatory scheme] is not lightly to be attributed to Congress." In the absence of an express intent to preempt or an occupation of the field by a federal regulatory scheme, an inference of preemption is only justified when there is clear inconsistency or conflict between federal and state law. *Cloverleaf Co.* v. *Patterson,* 315 U.S. 148, 156 (1942). There is no suggestion here, however, that the state statutes mandate or authorize conduct that violates federal law or that they place " 'irresistible pressure on a private party to violate the antitrust laws.' " See *Fisher* v. *City of Berkeley,* 475 U.S. 260, 265 (1986) (quoting *Rice* v. *Norman Williams Co.,* 458 U.S. 654, 661 (1982)); see also *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.,* 445 U.S. 97 (1980); *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U.S. 384 (1951). Indeed, the regulation of *conduct* is not what is at issue: the question before the Court pertains only to the remedies that a State may provide for conduct that is made unlawful by both state and federal law.

The court of appeals held that the state statutes, insofar as they permit indirect-purchaser suits, are preempted by federal antitrust law because they "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." See *Hines* v. *Davidowitz,* 312 U.S. 52, 67 (1941) (footnote omitted); *CTS Corp.* v. *Dynamics Corp. of America,* No. 86-71 (Apr. 21, 1987),

[10] Indeed, as appellants observe (J.S. 14-16), Congress apparently has approved an indirect-purchaser statute enacted by the District of Columbia.

slip op. 8. We think the court of appeals overextended that principle. There are circumstances in which state law, while not imposing directly conflicting requirements, so clearly frustrates the intended operation of a federal statute that preemption must be inferred. See, *e.g., Michigan Canners & Freezers Ass'n* v. *Agricultural Marketing & Bargaining Bd.,* 467 U.S. 461 (1984). But the *Davidowitz* principle only bars state frustration of federal regulation; it does not require the States to conform their "purposes" and "objectives" to those of Congress. Nor does the principle justify preemption simply to eliminate some inconvenience to the courts in administering the state and federal regulations. A determination that the purposes of a federal statute give that statute a certain reach does not, without substantially more, demonstrate that Congress wanted to preclude the States from enacting laws that reach further.

When Congress legislates in a field in which the States have traditionally regulated, there is a presumption that the historic police powers of the States are not to be superseded unless that purpose is clearly manifested. *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 146-147 (1963); *Jones* v. *Rath Packing Co.,* 430 U.S. 519, 525 (1977); *Rice* v. *Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947); *Hillsborough County* v. *Automated Medical Laboratories, Inc.,* 471 U.S. 707, 715 (1985); *CTS Corp.* v. *Dynamics Corp. of America,* slip op. 15-16; *Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum Corp.,* No. 86-1406 (Apr. 19, 1988), slip op. 4, 7. In particular, state law is not preempted merely because it provides additional or different remedies from those chosen by Congress. See, *e.g., Silkwood* v. *Kerr-McGee Corp.,* 464 U.S. 238 (1984) (state-law tort remedies for nuclear incidents are available, despite congressional determination that safety regulation is the exclusive concern of federal law, because Congress was aware of state remedies and apparently intended to tolerate the

tension between the two); *California* v. *Zook*, 336 U.S. 725, 736 (1949) (California might impose more serious penalties than Congress "if the California legislature deemed it wise").[11]

2. It would be particularly difficult to conclude that States may not adopt antitrust remedies differing from federal remedies. The state and federal antitrust statutes at issue here have similar objectives, a factor that generally counsels against preemption. See *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. at 132; *Guerra*, slip op. 15. Like the state laws at issue, the Sherman Act prohibits the price fixing alleged in this case. The purposes of the state and federal private damage remedies correspond as well: Congress and the States intended to compensate victims of antitrust violations and to enhance the effectiveness of enforcement through deterrence. *Union Carbide Corp.* v. *Superior Court*, 36 Cal. 3d at 20-22, 679 P.2d at 17-18, 201 Cal. Rptr. at 583-584; *Illinois Brick*, 431 U.S. at 746; *Crown Oil Corp.* v. *Superior Court*, 177 Cal. App. 3d at 607, 223 Cal. Rptr. at 165. Although the Clayton Act has been construed to create means of achieving compensation and deterrence that differ from the means chosen by the appellant States, it

[11] Indeed, the States generally may adopt standards of conduct that are more or less exacting than those mandated by federal law, unless the result is a frustration of the federal scheme. See *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. at 141-142 (State may impose more stringent standards for gauging the maturity of avocados for shipment within its borders); *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117 (1978) (potential conflict between State-imposed gasoline marketing requirements and Robinson-Patman Act, in that State might ban what federal law permits, is insufficient to nullify state regulation); *CTS Corp.* v. *Dynamics Corp. of America*, slip op. 11 & n.7 (more onerous state regulations of tender offers that do not "alter the balance * * * in any significant way" are not preempted).

does not for that reason preclude the States from making their different choice.[12]

Congress has repeatedly shown its awareness of state antitrust remedies and its understanding that, in the absence of specific congressional action to preempt them, they will coexist with federal remedies. For example, the legislative history of the exemption for agricultural cooperatives under the federal antitrust laws (Capper-Volstead Act, 7 U.S.C. 291, 292) indicates that "[i]n States where it is illegal to operate an association such as the ones permitted under this bill, it will * * * be practically impossible to operate under this legislation, as the bill only grants the right to operate in interstate and foreign commerce. That is the only power that Congress can confer upon such associations." H.R. Rep. 24, 67th Cong., 1st Sess. 2 (1921). In more recent legislation granting limited exemptions from the federal antitrust laws, Congress chose expressly to preempt state antitrust remedies. See National Cooperative Research Act of 1984, 15 U.S.C. (Supp. IV) 4303(c);[13] Export Trading

[12] Even when the regulation of conduct is at issue, the line of "state action" cases beginning with *Parker* v. *Brown*, *supra*, holds that the Sherman Act does not deprive States of their power to enact statutes that displace competition altogether, even though the core policy of the Sherman Act is to promote competition. See, *e.g.*, *Hoover* v. *Ronwin*, 466 U.S. 558, 567-568 (1984) ("under the Court's rationale in *Parker*, when a state legislature adopts legislation, its actions constitute those of the State * * * and *ipso facto* are exempt from the operation of the [federal] antitrust laws"). Given this latitude to depart from even the core procompetitive policy of the Sherman Act, it is anomalous to suggest that States must invariably conform to particular policies that this Court has invoked in determining the scope of federal remedies for antitrust violations.

[13] 15 U.S.C. (Supp. IV) 4303(c) provides:

> Notwithstanding any provision of any State law providing damages for conduct similar to that forbidden by the antitrust laws, any person who is entitled to recovery on a claim under such provision shall not recover in excess of the actual damages sustained * * *.

Company Act of 1982, 15 U.S.C. 4016, 4002(a)(7).[14] These express preemption provisions reflect Congress's understanding that, in the absence of express preemption, the States would be free to authorize independent and potentially conflicting private remedies. See S. Rep. 98-427, 98th Cong., 2d Sess. 14 (1984) ("[t]he protections afforded by title II to joint R&D programs from treble damages under Federal law would be largely vitiated by continuing treble damage exposure under State law").

3. This Court's decisions construing Section 4 of the Clayton Act (15 U.S.C. 15) as not permitting damage suits by indirect purchasers in most circumstances do not suggest that Congress intended to require state conformity on this point, as the court of appeals believed. See *Illinois Brick Co.* v. *Illinois, supra; Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968). Neither *Illinois Brick* nor *Hanover Shoe* contains any reference to state law or a congressional intent to preempt. Indeed, although the Court was engaged in a task of statutory interpretation, its decisions rested on a weighing of competing policy concerns rather than an analysis of statutory text and legislative history.

In *Hanover Shoe*, the Court held that a defendant in an antitrust action may not invoke a "pass-on" defense. Recognizing that "[a] wide range of factors influence a company's pricing policies," the Court was loath to inject into treble-damage actions "additional long and complicated proceedings involving massive evidence and complicated theories" (392 U.S. at 492-493). As a corollary, the Court

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[14] 15 U.S.C. 4016(a) provides:

> Except as provided in subsection (b) of this section, no criminal or civil action may be brought under the antitrust laws against a person to whom a certificate of review is issued * * *.

15 U.S.C 4002(a)(7) defines "antitrust laws" to include "any State antitrust or unfair competition law."

said that the effectiveness of treble-damage actions as a deterrent would be substantially reduced if indirect purchasers were allowed to sue. The Court reasoned that if effective measures for allocating overcharges in the chain of distribution could be fashioned, recoveries by indirect purchasers would diminish the damages recoverable by direct purchasers, but since the ultimate victims of the illegal charge, consumers, would have only a tiny stake in a lawsuit and little incentive to sue, the overall deterrent would be reduced (*id.* at 494; see also *Illinois Brick*, 431 U.S. at 725-726).

Subsequently, in *Illinois Brick*, indirect purchasers sought to use the "pass-on" theory offensively. The Court acknowledged that indirect purchasers may come within the language of Section 4 of the Clayton Act, but it nevertheless denied recovery (431 U.S. at 746-747). Citing its prior decision in *Hanover Shoe*, the Court concluded that a single rule should govern offensive and defensive pass-on theories (431 U.S. at 728-729). It decided to apply *Hanover Shoe* rather than overrule it, citing stare decisis (431 U.S. at 736-737) and the "absence of a convincing demonstration that the Court was wrong in *Hanover Shoe*" with respect to deterrence (*id.* at 729). The Court indicated, however, that passing-on theories might be permitted in cases in which market forces had been superseded, such as those involving preexisting cost-plus contracts or a direct purchaser owned or controlled by its customer (*id.* at 732 n.12, 736 n.16).

4. The court of appeals in this case discerned from this Court's decisions three policies served by its construction of the Clayton Act "in this context": "(1) avoiding unnecessarily complicated litigation; (2) providing incentives to direct purchasers to bring private damages actions; and (3) avoiding multiple liability for defendants" (J.S. App. A20-A21). The court concluded that these policies are impermissibly infringed by the state statutes.

A policy—invoked in construing a federal statute—against complicating litigation is not a basis for finding preemption of a state statute in the absence of an affirmative indication that Congress intended to force such a policy on the States. This Court was justifiably reluctant in *Illinois Brick* and *Hanover Shoe* to accept a construction of the Clayton Act that would result in complication of federal proceedings, but the reluctance stemmed from general concerns about complexity and judicial economy, not from any identifiable anti-complexity policy of the Clayton Act. State legislatures cannot lose their power to enact antitrust remedies merely because those remedies may make proceedings more complex than the judiciary would prefer.[15]

The policy against undercutting the incentives of potential plaintiffs to bring Sherman Act suits raises much more legitimate preemption concerns.[16] A state statute that

[15] In any event, as the court of appeals acknowledged (J.S. App. A21-A22), indirect-purchaser claims based on state law would not complicate federal damage claims if they were brought in state court. And even if they were joined with federal claims, the federal courts could decline to exercise pendent jurisdiction if the state claims posed significant additional burdens. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725-726 (1966).

[16] The court of appeals misdescribed this Court's objective as "providing incentives *to direct purchasers* to bring private damages actions" (J.S. App. A20-A21 (emphasis added)). This Court's objective was to minimize the number of antitrust violations that would go unpunished because no one had a sufficient incentive to sue, and the Court determined that allowing direct purchasers to recover for all overcharges, including those they had passed on to indirect purchasers, would serve that goal better than would allowing the use of both offensive and defensive passing-on theories. See generally *Hanover Shoe*, 392 U.S. at 494; *Illinois Brick*, 431 U.S. at 746-747. If the Court had thought otherwise—*i.e.*, had concluded that the deterrent objectives of the antitrust laws would be best served by allowing the use of passing-on theories—it presumably would not have cared that "incentives to direct purchasers" to sue were thereby lessened.

squarely undermined those incentives might frustrate the federal scheme and be preempted. But that is not the case here. Direct purchasers' entitlement under federal law to recover overcharges that they paid, without a deduction for passed-on overcharges, cannot be affected by state indirect-purchaser statutes.[17] Those statutes merely give additional plaintiffs the right to sue the defendants for additional sums, thus enhancing the deterrence of antitrust violations.

Finally, this Court in *Hanover Shoe* and *Illinois Brick* invoked a policy against duplicative recoveries. We assume for the purpose of analysis that some or all of the indirect purchasers' claims in this case are duplicative of direct purchasers' claims.[18] We submit, however, that there is nothing in the Clayton Act that deprives the States of the power to permit such recoveries.

[17] No one has suggested that the state statutes at issue in this case would be construed to allow a passing-on defense in an action in which a direct purchaser asserts its federal-law right to recover treble damages, or to take away from the direct purchaser and give to the indirect purchaser a portion of the recovered damages that is attributable to passed-on overcharges. If any statute were so construed, it would be preempted as so applied. See Note, *supra*, 34 Stan. L. Rev. at 208 n.24.

[18] The computation is complicated in this case because it was not litigated to conclusion but was settled. Appellants argue that any multiple-liability issue dropped out of the case once the defendants' liability became fixed (J.S. 19) and that the failure of certain direct purchasers to come forward to claim their shares of the settlement fund means at the least that honoring claims based on the corresponding indirect purchases would present no issue of duplicative recovery (J.S. 18). In our view, however, the sounder analysis requires the Court to meet head on the question whether the state statutes are valid even if applied to permit different plaintiffs to recover for the same overcharges. This was a class action. Every direct purchaser was a member of one of the plaintiff classes certified and had a right to share in the settlement fund, and every claim based on an indirect purchase necessarily overlapped with a valid claim that could have been made against the fund. Nor did the fact of settlement, by fixing the de-

Congress has established no policy against requiring an antitrust defendant to pay state and federal penalties cumulating to more than three times the total overcharge. Indeed, under federal law alone a defendant may be required to pay criminal fines in addition to treble damages. *E.g.*, *New York* v. *Hendrickson Bros.*, 840 F.2d 1065, 1086 (2d Cir. 1988).[19] And under ordinary principles of preemption, state penalties that are more onerous than federal penalties are not precluded in the absence of evidence of a congressional intention to preclude them. *California* v. *Zook*, 336 U.S. 725, 736 (1949); *Agency Rent-A-Car, Inc.* v. *Connolly*, 686 F.2d 1029, 1037, 1039 (1st Cir. 1982). Although a single plaintiff usually will not be able to claim damages under federal and state law for the same injury,[20] nothing in

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fendants' total liability, render the existence of overlapping claims irrelevant. The settlement, as construed by the court of appeals (see J.S. App. A26), left open the question whether the indirect purchasers' claims were valid. If those claims were invalid ab initio because they overlapped with direct purchasers' claims, the settlement cannot have made them valid.

[19] See Clayton Act § 5, 15 U.S.C. 16(a) (criminal conviction can be used as prima facie evidence of antitrust violation in subsequent civil suit); see also 18 U.S.C. (Supp. IV) 3623(c)(1) (repealed effective Nov. 1, 1987) (authorizing criminal penalties amounting to twice the defendant's pecuniary gain or twice the victim's pecuniary loss).

[20] A single plaintiff can recover from a defendant on multiple damage theories, although he cannot obtain a "double recovery" for any one injury. See *McDonald* v. *Johnson & Johnson*, 722 F.2d 1370, 1381 (8th Cir. 1983) (en banc) (compensatory damages for antitrust, fraud, and breach of contract claims were not impermissibly duplicative but punitive damages on fraud count were disallowed because deemed duplicative of statutory trebled damages), cert. denied, 469 U.S. 870 (1984); *Woods Exploration & Producing Co.* v. *Aluminum Co. of America*, 438 F.2d 1286, 1314-1315 (5th Cir. 1971) (recovery in federal antitrust suit bars recovery in state antitrust suit since former compensated plaintiff for total harm suffered), cert. denied, 404 U.S. 1047 (1972); *Colorado* v. *Asphalt Paving Co.*, 1987-1 Trade Cas. (CCH) ¶ 67,473 (D. Colo. 1987) (State cannot recover damage for bid rigging under both federal and state antitrust laws); *Wynn Oil Co.* v. *Purolator Chemical Corp.*, 403 F. Supp. 226, 231 (M.D. Fla. 1974) (affirming award for treble damages under Sherman Act as well as compensatory and punitive damages under state contract and tort laws); *California* v. *National Ass'n of Realtors*, 1981-1 Trade Cas. (CCH) ¶ 64,102, at 76,647-76,648 & n.7 (Cal. Ct. App. 1981) (multiple claims under separate state statutes permitted as long as duplicative damages were not recovered on both claims).

federal law protects defendants from having to pay damages equal to more than (or more than three times) their total overcharges in order to compensate a plaintiff a State chooses to protect as well as the plaintiffs who may recover under federal law. The state indirect-purchaser statutes therefore do not create such an "irreconcilable conflict" (*Rice* v. *Norman Williams Co.*, 458 U.S. at 659) with the policies enunciated in *Illinois Brick* that the state remedies can be said to frustrate the intended operation of the remedial scheme of the Clayton Act.[21]

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[21] We agree with the student commentator who wrote (Note, *supra*, 34 Stan. L. Rev. at 212 (footnotes omitted)):

> In declining to allow duplicative recovery, the Court [in *Illinois Brick*] was simply unwilling to go beyond section 4 of the Clayton Act, which authorizes only the award of treble damages. This decision does not *prevent* duplicative recovery; rather, it states the more limited policy of *permitting* only one treble damage recovery under the federal law. The decision not to permit duplicative recovery, therefore, was simply a matter of interpretation of a federal antitrust statute.
>
> The majority opinion in *Illinois Brick* properly identified itself as a decision "in the area of statutory construction" involving "this Court's interpretation of [Congress's] legislation." The decision to avoid duplicative recovery and the complementary decision to deny indirect purchasers a cause of action were based on federal policy

To be sure, allowing such duplicative recoveries will be a harsh result for the defendants in cases in which such duplicative recoveries are actually obtained. Our own view is that the Court was wise in *Illinois Brick*, 431 U.S. at 731 n.11, to deem "not * * * acceptable" within the federal scheme itself the risk of multiple recoveries in a case in which no legislature had clearly provided for such recoveries. But the legislatures of the States are entitled to find acceptable that which this Court, in construing a federal statute, finds unacceptable, so long as they do not flout the will of Congress. And it appears that the legislatures of California, Minnesota, Alabama, and perhaps Arizona think it better that there might be multiple recovery in some cases than that they and their citizens go uncompensated for economic injuries.[22] Congress has done nothing to prevent those legislatures from supplementing the remedial scheme of the federal antitrust laws.

In these circumstances, there is no basis for a conclusion that the Clayton Act preempts state indirect-purchaser statutes. The lower courts cited no direct evidence—and we are aware of none—to indicate that Congress in enacting Section 4 of the Clayton Act had any intention of limiting the freedom of the States to adopt additional damage remedies for conduct prohibited by state as well as federal law. Nor is there any reason to conclude that damage claims by indirect purchasers would so frustrate the intended

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considerations and are limited in their effect to the federal law. Nothing in the *Illinois Brick* decision establishes a federal policy of preventing indirect purchaser suits under *state* law.

[22] Of course, it is possible that the States' indirect-purchaser statutes might be construed, as a matter of state-law statutory interpretation rather than federal preemption, to deny indirect purchasers any recovery that would duplicate a direct purchaser's recovery. The court of appeals, however, did not address any such questions of state statutory construction (J.S. App. A24), nor do we.

operation of the federal antitrust laws that they must be prohibited.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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No. 87-1862

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

STATE OF CALIFORNIA, et. al.,
Appellants,

v.

ARC AMERICA CORPORATION, et. al.,
Appellees.

On Appeal from
the United States Court
of Appeals for the Ninth Circuit

BRIEF OF TWENTY STATES AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

INTRODUCTION

The States of Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, Oklahoma, South Dakota, Tennessee, West Virginia, Wisconsin, the

Commonwealth of Virginia and the District of Columbia ("Amici States") submit this brief in support of the Jurisdictional Statement submitted by the States of California, Minnesota, Arizona and Alabama.

INTERESTS OF THE AMICI STATES

The Amici States have a clear and strong interest in defending the constitutionality of statutes enacted by their legislatures. The Attorneys General of the Amici States are charged by law with the duty to defend the constitutionality of their States' statutes. See, e.g., 28 U.S.C. § 2403(b).

In the instant case, the Ninth Circuit Court of Appeals found that four state statutes providing indirect purchasers with a right to recover money damages from antitrust wrongdoers were preempted. In Re Cement and Concrete Antitrust Litigation, 817 F.2d 1435, 1447 (9th Cir. 1987) ("Cement"). A number of the Amici States have enacted statutes permitting indirect purchasers to sue for money damages under their antitrust statutes. See D.C. Code § 28-4059

(1981) Hawaii Rev. Stat. § 480-13 (Supp. 1987); Ill. Rev. Stat. Ch. 38 § 60-7(2) (Supp. 1987); Md. Com. Law Code Ann. § 11-209(b)(2)(ii) (1983); Mich. Comp. Laws § 445.778 (1984); Miss. Code Ann. §§ 75-21-9, 75-41-15 (1972); S.D. Codified Laws Ann. § 37-1-33 (1986); Wisc. Stat. Ann. § 133.18(1) (West Supp. 1987). Although these statutes are not directly at issue in this case, inevitably the decision of the court below will be asserted to challenge their constitutionality.

State antitrust laws are generally construed to be consistent with the federal antitrust laws. Many State antitrust laws, however, include provisions which differ from federal antitrust law. See Lifland, State Antitrust Law § 1.02 at 1-3--1-10 (1988). For example, some State statutes of limitations applying to antitrust cases differ from the statute of limitations in the Clayton Act.[1/] Other State

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1/ Compare 15 U.S.C. § 15b (four year statute of limitations) and Ohio Rev. Code Ann. § 1331.12 (1979) ("No statute of limitation shall prevent or be a bar to any suit or proceeding for any violation" of the (Continued)

antitrust statutes provide remedies that differ from or add to the remedies available under federal law, such as civil penalty statutes. See, e.g., Conn. Gen. Stat. § 35-38 (1987); N.J. Rev. Stat. § 56:9-10(a) (Supp. 1987); Va. Code § 59.1-9.11 (1987).

The decision below conceivably provides a basis for challenging any State law provision that differs from the Supreme Court's construction of comparable federal law. The Attorneys General of the respective States would be required to defend their statutes from such challenges. The prospect of such challenges creates unnecessary uncertainty and would hamper the effective enforcement of State laws.

Finally, the Amici States are major purchasers of goods and products that pass through chains of

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Valentine Act, Ohio's antitrust law.) A federal district court held that Ohio's statute of limitations was preempted by the Clayton Act. Pinney Dock & Transport Co. v. Penn Central Corp., 1982-83 Trade Case (CCH) ¶65,053 (N.D. Ohio 1982). The Sixth Circuit recently reversed and held that this statute was not preempted. Pinney Dock & Transport Co. v. Penn Central Corp., 1988-1 Trade Reg. Rep. (CCH) ¶67,876 (6th Cir. 1988).

distribution. States bear the burden of unlawful overcharges passed on to them by antitrust wrongdoers. Overcharges unjustly increase the burden on the States' taxpayers. States, thus, have a strong interest in having available a remedy under their respective antitrust laws to recover damages from antitrust wrongdoers for overcharges on indirect as well as direct purchases.

The Amici States support the contention of California, Arizona, Minnesota and Alabama that State statutes permitting recovery of damages by indirect purchasers under State antitrust laws do not conflict with federal antitrust law or policy. The Amici States contend that such statutory provisions do not offend the Constitution and are not preempted.

SUMMARY OF ARGUMENT

The key question in determining whether a State statute is impliedly preempted is: Does the statute stand as an obstacle to accomplishing the purposes and objectives of Congress? The court below erred by

holding that the State antitrust statutes allowing indirect purchasers to recover money damages were impliedly preempted. The court's decision was not based upon a consideration of Congressional purpose, but on narrower policy concerns expressed by this Court in Hanover Shoe, Inc. v. United Shoe Machinery Company, 392 U.S. 481 (1968) and Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). These cases construe section 4 of the Clayton Act but do not purport to express the broad and expansive remedial purpose of Congress in enacting section 4. State indirect purchaser statutes are entirely consistent with section 4 and are not preempted.

ARGUMENT

I.

THE COURT BELOW ERRED BY FINDING IMPLIED PREEMPTION WITHOUT REFERRING TO THE PURPOSES AND OBJECTIVES OF CONGRESS

A State statute is preempted by an act of Congress only if Congress expressly states an "intent

to occupy" the field [2/] or the State statute:

> actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217-1218, 10 L.Ed.2d 248 (1963); or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). Pacific Gas & Electric, supra, at 203-04, 103 S.Ct. at 1721-22.

Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984). The latter form of preemption, known as the doctrine of implied preemption, is applied conservatively: the "teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists." Exxon Corp. v. Governor of Md., 437 U.S. 117, 130 (1978). See also Rice v. Norman Williams Co., 458 U.S. 654, 664 (1982).

The court below confused policy considerations utilized by the Supreme Court in construing section 4

2/ There is no issue of express preemption in this case. See 817 F.2d at 1444.

of the Clayton Act with the overriding purposes and objectives of Congress. In so doing, it ignored the clear language of this Court in Silkwood, and the cases cited therein, that the "purposes and objectives of Congress" are the critical focus of preemption analysis. 464 U.S. at 248. See Retail Clerks, Int'l. Ass'n v. Schermerhorn, 375 U.S. 96, 103-4 (1963).

The court below properly conceded that Congress did not intend to occupy entirely the field of antitrust enforcement. 817 F.2d at 1444. Further, the court below did not find it impossible to comply with both federal and State statutes.[3/] However, the court failed to consider the "full purposes and objectives of Congress" in determining whether the State indirect purchaser statutes were preempted. Instead, it held that State indirect purchaser statutes were preempted because "the indirect purchase claims asserted here

---

3/ See also Silkwood 464 U.S. at 257 ("Paying both federal fines and state-imposed punitive damages for the same incident would not appear to be physically impossible").

would impermissibly interfere with the three policy goals outlined [by the Supreme Court] in Hanover Shoe and Illinois Brick." 817 F.2d at 1445. It described these "policy goals" as: "(1) avoiding unnecessarily complicated litigation; (2) providing incentives to direct purchasers to bring private damage actions; and (3) avoiding multiple liability for defendants." 817 F.2d at 1445.

As demonstrated below, in Hanover Shoe and Illinois Brick, this Court did not intend to limit State antitrust laws. Moreover, the policy concerns expressed in those cases are not, and were not intended to constitute, the "purposes and objectives of Congress."

II.

HANOVER SHOE AND ILLINOIS BRICK DID NOT STATE THE PURPOSES AND OBJECTIVES OF CONGRESS EMBODIED IN SECTION 4 OF THE CLAYTON ACT

In Illinois Brick and Hanover Shoe, this Court did not purport to base its holdings on fundamental Congressional policy. In Hanover Shoe, the Court held

that a direct purchaser is injured by the full amount of any overcharge paid by it; a defendant could not raise as a defense that the direct purchaser had passed on the overcharges to its purchasers. See 392 U.S. at 487-94. In Illinois Brick, this Court reaffirmed its holding in Hanover Shoe and ruled that an indirect purchaser, Illinois, was not injured in its business or property within the meaning of section 4 of the Clayton Act.[4/] See 431 U.S. at 733-37. Thus, the Illinois Brick decision recognized a defense against treble damage claims brought by indirect purchasers.

The holdings of Hanover Shoe and Illinois Brick were confined to constructions of section 4 of the

---

4/ Section 4 of the Clayton Act provides, in pertinent part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the Antitrust laws may sue therefore in any district court of the United States . . . and shall recover threefold the damages by him sustained . . . . 15 U.S.C. § 15.

Clayton Act. For example, in Illinois Brick this Court stated the issue presented:

> In this case we once again confront the question whether the overcharged direct purchaser should be deemed for purposes of § 4 to have suffered the full injury from the overcharge . . .

431 U.S. at 724 (emphasis added). This Court gave no indication in Illinois Brick or Hanover Shoe that it intended or expected its decision to affect State antitrust laws. Indeed, State laws and remedies were not even discussed.

The Court's decision in Illinois Brick does not express fundamental Congressional policy because it does not always excuse defendants from liability to indirect purchasers under the federal antitrust laws. For example, the Court recognized exceptions to the indirect purchaser defense when the indirect purchaser obtained goods pursuant to a pre-existing cost-plus contract, 431 U.S. at 735-36 or from a direct purchaser owned or controlled by the defendant. 431

U.S. at 736 n.16.[5/] In addition, indirect purchasers may still pursue their right to injunctive relief under section 16 of the Clayton Act. 15 U.S.C. § 26.

III.

THE THREE POLICIES UPON WHICH THE COURT BELOW BASED ITS PREEMPTION DECISION DO NOT CONSTITUTE THE PURPOSES AND OBJECTIVES OF CONGRESS

The court below cited three policy concerns of this Court, not of Congress, in construing section 4 of the Clayton Act. By failing to distinguish between judicial concerns and congressional policy, the court below violated the fundamental rule of pre-emption analysis, that "[t]he purpose of Congress is the ultimate touchstone." Retail Clerks Int'l. Ass'n. v. Schermerhorn, 375 U.S. at 103.

5/ Federal courts have subsequently extended Illinois Brick exceptions to sales that are the "functional equivalent" of a cost-plus contract, See In re Beef Industry Antitrust Litigation, 600 F.2d 1148 (5th Cir. 1979), cert. denied 449 U.S. 905 (1980), and sales where the direct purchaser is a co-conspirator of the manufacturer, See In re Mid-Atlantic Toyota Antitrust Litigation, 516 F. Supp. 1287 (D.Md. 1981).

In Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982), this Court did distinguish between the policy concerns that supported its Illinois Brick decision and the purposes and objectives of Congress. The Court articulated both the "expansive remedial purpose" of Congress embodied in section 4 of the Clayton Act and the narrower policy considerations employed by the Court to decide Illinois Brick. See 457 U.S. at 472-75.

In McCready the Court granted the plaintiff standing to sue an insurer that had allegedly conspired with physicians to exclude psychologists from receiving payments under her insurance plan. The Court identified the "expansive remedial purpose" of Congress in enacting section 4 of the Clayton Act and stated, "The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." 457 U.S. at 472. The Court added, "Consistent with the congressional purpose, we have

refused to engraft artificial limitations on the §4 remedy". Id.

The Court stated that the policy concerns against duplicative recovery expressed in Illinois Brick were identified by "drawing on statutory policy." 457 U.S. at 473. Thus, this Court, seeking a principled approach to limit the scope of recoveries under section 4, expressed its concerns and not the purposes or objectives of Congress.[6/]

McCready recognized that the purpose of Congress was to provide an expansive remedy in section 4. Thus, while a policy against duplicative recoveries may be consistent with the "expansive remedial purpose" of Congress it does not constitute that purpose. States may thus enact laws, using policy considerations that differ from those articulated in

---

6/ This Court's policy concerns need not be affected by State indirect purchaser statutes, for federal courts exercise discretionary authority over pendant state claims. See United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966).

Illinois Brick, which are entirely consistent with Congressional purpose.

In McCready, this Court also stated that there are policies outside of those which are contained in the "broader remedial purpose of the antitrust laws," which it felt necessary, "in certain limited circumstances" to apply in construing section 4. 457 U.S. at 475 n.11. This Court identified one such policy as preventing complicated damage cases. Thus, while subordinate policies to facilitate judicial administration, such as concern about complex damage cases, may constitute valid considerations in deciding a case, this Court does not equate them with Congressional purpose.

In addition to the two policy concerns expressed in McCready, the court below specified a concern about encouraging direct purchasers about to become plaintiffs. Consistent with the "expansive" "broader remedial purpose" of Congress, this concern seeks to ensure that plaintiffs have an incentive to sue under

federal law. This policy is in no way compromised by a State law that ensures that other plaintiffs will also have incentives to enforce antitrust laws.

State indirect purchaser statutes, which permit a broader range of plaintiffs to enforce the antitrust laws, are in harmony with Congress' "broader remedial purpose." Read together with section 4, they truly permit "any person who shall be injured in his business or property" to recover damages from antitrust wrongdoers. See 15 U.S.C. § 15. They enhance the Sherman Act's fundamental purpose of providing a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition." Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4 (1958).

IV.

RECOGNITION OF A DEFENSE UNDER THE FEDERAL ANTITRUST LAWS DOES NOT PREEMPT STATE LAW WHICH DOES NOT RECOGNIZE THAT DEFENSE

Rather than setting forth a new statement of Congressional policy, this Court in Illinois Brick

recognized a defense to treble damage claims, based on its interpretation of section 4 of the Clayton Act. As demonstrated in Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978), a defense recognized under the federal antitrust laws does not preempt State law that declines to recognize, or limits, that defense.7/ This Court stated:

> The proviso in § 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, is merely an exception to that statute's broad prohibition against discriminatory pricing. It created no new federal right; quite the contrary, it defined a specific, limited defense, and even narrowed the good-faith defense that had previously existed. To be sure, the defense is an important one, and the interpretation of its contours has been informed by the underlying national policy favoring competition which it reflects. But it is

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7/ In Exxon, the appellant oil companies argued that the provisions of Maryland's Divestiture Law requiring producers, refiners or wholesalers of petroleum products supplying gasoline to retail service stations to "extend all voluntary allowances uniformly to all retail service station dealers supplied," Md. Ann. Code art. 56, § 157E(d) (1983), violated a federal right contained in section 2(b) of the Robinson-Patman Act, 15 U.S.C. § 13(b). Section 2(b) creates an exception to that Act's general prohibition of price discrimination to permit lower price offers made in good faith to meet the price offered by a competitor.

> illogical to infer that by excluding certain competitive behavior from the general ban against discriminatory pricing, Congress intended to pre-empt the States' power to prohibit any conduct within that exclusion. This Court is generally reluctant to infer pre-emption, see, e.g., De Canas v. Bica, 424 U.S. 351, 357-358, n.5; Merrill Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117, 127, and it would be particularly inappropriate to do so in this case because the basic purposes of the state statute and the Robinson-Patman Act are similar. Both reflect a policy choice favoring the interest in equal treatment of all customers over the interest in allowing sellers freedom to make selective competitive decisions.

437 U.S. at 132-33. In this case, as in Exxon, because State indirect purchaser statutes are entirely consistent with the overriding federal policy of fostering competition and, indeed, enforce that policy by the threat of treble damages, there is no preemption.

V.

THIS COURT SHOULD UPHOLD THE EFFICACY OF STATE ANTITRUST LAWS

Preempting state antitrust laws that permit indirect purchasers to recover damages would compromise the efficacy of state antitrust law in

contravention of this Court's longstanding treatment of such laws. See, e.g., Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); Watson v. Buck, 313 U.S. 387 (1941); Puerto Rico v. Shell Co., 302 U.S. 253 (1937); Standard Oil of Kentucky v. Tennessee, 217 U.S. 413 (1910). Indeed, preemption would contradict the very purpose of the Sherman Act, which was enacted to supplement, not supplant, state antitrust enforcement. See 21 Cong. Rec. 2457 (1890). Senator Sherman, urging passage of the Act, stated that its purpose "is to arm the Federal courts within the limits of their constitutional power that they may cooperate with the State courts in checking, curbing, and controlling the most dangerous combinations that now threaten the business, property and trade of the people of the United States." Id. (emphasis added).

States should remain free to provide indirect purchasers with the right to seek damages from wrongdoers under their respective antitrust laws. This

freedom advances the "full purposes and objectives" of Congress in enacting antitrust legislation.

VI.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of the appeal of California, Minnesota, Arizona and Alabama or, in the alternative, grant the petition of these States for a Writ of Certiorari.

Dated: June 6, 1988

Respectfully submitted,

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JOINT

APPENDIX

(15)

No. 87-1862

Supreme Court, U.S.
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NOV 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

STATE OF CALIFORNIA, *et al.*,
Appellants,

vs.

ARC AMERICA CORPORATION, *et al.*,
Appellees.

On Appeal From the United States Court of Appeals For the Ninth Circuit

JOINT APPENDIX

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(Continued on inside front cover)

Jurisdictional Statement filed May 9, 1988
Probable Jurisdiction noted October 3, 1988

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COMPLAINT IN *CALIFORNIA v. PORTLAND CEMENT ASSOCIATION, ET AL.* ..... J.S. APP. A-86

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RELEVANT DOCKET ENTRIES

STATE OF ARIZONA v. PORTLAND CEMENT ASSN., et al.

1976			
Sept.	23	1	Complaint.
Dec.	17	78	First Amended Complaint and Demand for Jury Trial.
1977			
Jan.	7	92	Amended Complaint.
1981			
2/	5/81	—	Dfts Southdown, Inc & Southwester Portland Cement Co settled, see Judgment pursuant to PTO 67, fld this date in MDL 296, cpy thereof placed in this file.
2/	5/81	—	Dfts Amcord, Inc. (& wholly owned subsidiaries of Amcord, Inc.), Gifford-Hill & Co. & Gifford-Hill Portland Cement Co., settled, see jdgm purs to PTO 67, fld this date in MDL 296, doc # 1492, cpy thereof pld in this file.
2/	5/81	—	Defts Calif Portland Cement Co & its unincorporated Div, AZ Portland Cement Co settled, see jdgm purs to PTO 67, fld this date in MDL 296, doc # 1490, copy thereof pld in this file.
1982			
2/	4/82	—	Dfts Northwestern States Portland Cement Co, settled, see judm purs to PTO 81, fld this date in MDL 296, doc # 1777, cpy thereof pld in this file.
2/	4/82	—	Dfts Penn-Dixie Industries settled, see jdgm purs to PTO 81, fld this date in MDL 296, # 1779, cpy thereof pld in this file.
4/	1/82	152	Plntf State of Arizona Mtn for lv to file 2nd amended complaint.
4/	1/82	—	LODGED—Second Amended cmplnt.

1983

7/22/83 — MDL ORDER: Hon CAM's recusal stands & litigation is reassigned to Hon. Manuel L. Real from Central Dist of Calif, sitting in Dist of AZ, fld this date in MDL 296, Doc 2016, copy thereof placed in this file.

1984

6/16/84 — Pretrial order # 102 grntg dfts mtn for S/J & dismg all claims of plntfs agnst dfts, see doc # 3318 in MDL 296 docketed this date, cpy pled in this file.

4/19/84 158 JUDGMENT: Dfts mtn for S/J hvg been grntd, plntf take nothing & all claims of said plntf are dism w/prej.

10/ 4/84 19 Pltf's Notice of Appeal fr DC # 3583 in MDL 296. ($70pd) (CA-84-).

STATE OF ALABAMA v.
PORTLAND CEMENT ASSOCIATION, et al.

1979

—

July 30 1 Complaint and original or record.

1980

April 21 7 State of Alabama's Amended Complaint and Jury Trial Demand

1981

2/ 5/81 — Dfts Southdown, Inc. & Southwestern Port- PTO 67, fld this date in MDL 296, doc # 1489, cpy thereof pled in this file.

2/ 5/81 — Dfts California Portland Cement Co & its unincorp divsn Arizona Portland Cement Co settled, see jdgm purs to PTO 67, fld this date in MDL 296, doc # 1490, cpy thereof pled in this file.

2/ 5/81 — Dfts River Cement Co settled, see jdgm purs to PTO 67, fld this date in MDL 296, doc # 1491, cpy thereof pled in this file.

2/ 5/81 — Dfts Amcord, Inc (& wholly owned subsidiaries of Amcord, Inc.), Gifford-Hill & Co & Gifford-Hill Portland Cement Co., settled, see jdgm purs to PTO 67, fld this date in MDL 296, doc # 1492, cpy pled in this file.

1982

2/ 4/82 — Dft Northwestern States Portland Cement Co settled see jdgm purs to PTO 81 fld this date in MDL 296, doc # 1777, cpy thereof pled in this file.

2/ 4/82 — Dft Atlantic Cement Co settled see jdgm purs to PTO 81 fld this date in MDL 296, doc # 1778, cpy thereof pled in this file.

2/ 4/82 — Dft Penn-Dixie settled see jdgm purs to PTO 81 fld this date in MDL 296, doc # 1779 cpy thereof pled in this file.

1983

7/22/83 — MDL ORDER: Hon CAM's recusal stands & litigation is reassigned to Hon Manuel L Real from Central Dist of CA, sitting in Dist of AZ, fld this date in MDL 296, Doc 2016, copy thereof placed in this file.

1984

2/16/84 — Pretrial Order # 101, re: Dfts mtn for partial S/J (2579) grntd agnst plntf Smith & Green Corp (77-717) to dism all fed claims as outlined in this ord. Fur ord the mtn grntd agnst plntfs States of Kansas (77-603), Alabama (79-620), Florida (80-192), Montana (79-196), Minnesota (79-619), Missouri (79-194), Nebraska (79-195), New Mexico (79-201), Texas (79-868) & Louisiana (79-629) dismg all fed claims for dmgs as outlined in this ord.

3/ 5/84 — Pltf's Notice of Appeal (DC # 3106) fr DC # 2943 and 2984 docketed in MDL 296. All further entries regarding appeal to be docketed in MDL 296.

STATE OF CALIFORNIA v. PORTLAND CEMENT ASSOCIATION, et al.

(C.D. Cal.)

0/76 mn 1. Fld Complnt. Issued summs. w/DEMAND FOR JURY TRIAL.

/77 ejb 11. Fld pltfs' memo in oppos to certain defts motns (a) to strike averments of Fraudulent concealment; (b) to dsm claims antedating the flg of the complts by more than 4 yrs (c) for a more definite stmt; (d) to dsm the Prayer, which seeks Civil Penalties.

3/18/77 rlb 19. Fld ORD Dnyg mot to dsm clm for civil penalities.

9/27/77 ejb 35. Fld OPINION AND ORDER OF THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION Transferring actn to the District of Arizona. Mld cpys. Notfy Prtys. (Ent 9/27/77) JS-6.

STATE OF CALIFORNIA v. PORTLAND CEMENT ASSOCIATION, et al.

(D. Az.)

1977

Sep 30 1 Original record received from the C.D. Calif, No. 76-4073-FW, (Documents numbered 1 thru 35) with cc of docket entries.

2/ 5/81 — Dfts Southdown, Inc & Southwestern Portland Cement Co. settled, see jdgm purs to PTO 67, fld this date in MDL 296, doc #1489, cpy thereof plcd in this file.

2/ 5/81 — Dfts Amcord, Inc. (& wholly owned subsidiaries of Amcord, Inc.), Gifford-Hill & Co. & Gifford-Hill Portland Cement Co., settled, see jdgm purs to PTO 67, fld this date in MDL 296, doc #1492, cpy thereof plcd in this file.

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2/ 4/82 — Dft Penn-Dixie Industries settled see jdgm purs to PTO 81 fld this date in MDL 296, cod #1779, cpy thereof plcd in this file.

1983

7/22/83 — MDL ORDER: Hon CAM's recusal stands & litigation is reassigned to Hon Manuel L. Real from Central Dist of CA, sitting in Dist of AZ, fld this date in MDL 296, Doc 2016, copy thereof placed in this file.

3/27/84 24 Declaration of Michael R. Granen.

5/ 9/84 — Pretrial Order #105 (PC hld 4/26-27/84) Ord grntg dfts mtn to strike pendent state law claims (MDL 296 #3167) & dismg pendent state law claims of State of Alabama (79-620), State of California (77-758), State of Florida (80-192), State of Minnesota

(79-619), State of Missouri (79-194), & State of Montana (79-196) w/o prej. (see ord fld this date in MDL 296, #3397, cpy thereof pld in this file.)

01/17/85 31 Ordr re Final apprvl of class sttlmnt & plan of dstrbtn: ORDRD tht the Crt is stsfd tht the class sttlmnt between pltf State of CA & Portland Cement Asscin, Kaiser, Lone Star, Flintkote, Monolith, General Portland & Ideal Basic, is fair, adequate & reasonable & in the best interests of the CA Govtl Class. Sttlmnt agrmnt was fld w/the Crt on 10/31/84. Pursnt to ordrs of the Crt, sttlmnt agrmnt was prelmnry apprvd & ntc was provded to the class. No class membr has apprd & objctd to sttlmnt. Crt hereby finlly apprvs of sttlmnt between the State of CA & Portland Cement Asscin, Kaiser, Lone Star, Flintkote, Monolith, General Portland & Ideal Basic. Crt is satsfd tht the plan of dstrbtn proposed by CA Atty Gnrl is fair adequate & reasnbl & in the best interests of the CA Govtl Class.

01/17/85 33 FINAL JUDGMENT: ORDRD, ADJ & DCRD for purposes of entrng this jdgmt, this Crt has jursdctn over the sumjct mttr of this litgtn & over the State of CA, ea membr of the CA Govtl Class, & ea of the dfts. Jdgmt shall be, &/it is hereby entrd dsmssng this actn w/prej.

STATE OF MINNESOTA v. PORTLAND CEMENT ASSOCIATION, et al.

1979

Jul 30 1 Transfer Order and original of record.

1981

2/ 5/81 — Defts Southdown, Inc. & Southwestern Portland Cement Co settled, see jdgm purs to PTO 67, fld this date in MDL 296, doc # 1489, cpy thereof pld in this file.

— Dfts Amcord, Inc. (& wholly owned subsidiaries of Amcord, Inc.), Gifford-Hill & Co. & Gifford-Hill Portland Cement Co., settled, see jdgm purs to PTO 67, fld this date in MDL 296, doc # 1492, cpy thereof pld in this file.

— Dft River Cement Co. settled, see jdgm purs to PTO 67, fld in MDL 296 this date, doc # 1491, cpy pld in this file.

— Dft Calif Portland Cement Co & its unincorp division Arizona Portland Cement Co settled, see jdgm purs to PTO 67 fld this date in MDL 296, doc # 1490, cpy pld in this file.

3/18/81 75 Stip & ord dism cmplnt w/prej as to dfts Amcord, Inc, Gifford-Hill & Co., Inc & Gifford-Hill Portland Cement Co., ea party to bear own costs. IT IS SO ORD.

3/27/81 76 Stip and ORDER dismissing complaint w/ prejudice as to Deft CA Portland Cement Co. and its division, AZ Portland Cement Co. ea party to bear own costs.

4/ 7/81 77 Stip and ORDER dismissing complaint w/ prejudice as to defts Southdown, Inc. and SW Portland Cement Co., ea party to bear own costs.

1982

2/ 4/82 — Dft Northwestern States Portland Cement Co settled see jdgm purs to PTO 81 fld this date in MDL 296, doc # 1777, cpy pld in this file.

— Dft Atlantic Cement Co settled see jdgm purs to PTO 81 fld this date in MDL 296, doc # 1778, cpy pld in this file.

— Dft Penn-Dixie Industries settled see jdgm purs to PYO 81 fld this date in MDL 296, doc # 1779, cpy pld in this file.

1983

7/22/83 — MDL ORDER: Hon CAM's recusal stands & litigation is reassigned to Hon Manuel L Real from Central Dist of CA, sitting in Dist of AZ, fld this date in MDL 296, Doc 2016, copy thereof placed in this file.

1984

2/22/84 82 Plntf State of Minnesota mtn for Certification of a Minnesota Govtl Entities Class

83 Plntfs suppl memo in support of # 82

4/16/84 — Pretrial Order # 101, re: Dfts mtn for partial S/J (2579) grntd agnst plntf Smith & Green Corp (77-717) to dism all fed claims as outlined in this ord. Fur ord the mtn grntd agnst plntfs States of Kansas (77-603), Alabama (79-620), Florida (80-192), Montana (79-196), Minnesota (79-619), Missouri (79-194), Nebraska (79-195), New Mexico (79-201), Texas (79-868) & Louisiana (79-629) dismg all fed claims for dmgs as outlined in this ord. Fur ord grntg said mtn agnst plntf Thriftway Lumber Co. (77-724) & State of

Utah (79-202) dismg all fed claims for dmgs as outlined. Fur ord grntg said mtn agnst plntf Hechinger Co (76-853) dismg all fed claims as outlined. Fur ord grntd said mtn agnst City of Austin (77-54) dismg all fed claims for damages as outlined. (see ord fld this date in MDL 296, #3317, cpy pld in this file)

3/ 5/84 — Pltf's Notice of Appeal (DC # 3106) fr DC # 2943 and 2984 docketed in MDL 296. All further entries regarding appeal to be docketed in MDL 296.

IN RE: CEMENT AND CONCRETE ANTITRUST LITIGATION (CONSOLIDATED INTO CIV 76-488-A PHX CAM) (D. Az.)

1976

Dec 16 2 Pretrial Order No. 3. That the numbered cases are hereby coordinated for pretrial purposes: CIV 76-488, CIV 76-672, CIV 76-680, CIV 76-710, CIV 76-769, CIV 76-814, CIV 76-827, CIV 76-839, CIV 76-853, CIV 76-854, CIV 76-855, CIV 76-913, CIV 76-914, CIV 76-923 and CIV 76-929. The Clerk of this Court will establish a master file for common pleadings in these coordinated actions which file shall be captioned and denominated "In Re Cement & Concrete Antitrust Litigation" and assigned File No. 76-488-A PHX-CAM.

1977

Jan 10 69 State of California's Motion, before Judicial Panel on Multidistrict Litigation, to Transfer.

Mar 15 388 Reporter's Transcript of Proceedings, U. S. D. C. for Central District of California Re: The State of California, et al vs. Portland Cement Assoc., et al.

Mar 21 399 State of Arizona's Motion to Allow Federal Trade Commission Access to Pltfs' Document Depository.

Apr 11 464 Joint Response of Certain Defts in Opposition to the State of Arizona's Motion to Allow Federal Trade Commission Access to Pltfs' Document Depository (All Cases).

May 24 777 Pretrial Order No. 9.

Jul 6 1517 Pretrial Order No. 11 (Re: Revised Schedule for Class Action Determination.)

IN RE CEMENT AND CONCRETE ANTITRUST LITIGATION, MDL 296

1977

Sep 21 1 co of Order from MDL Panel re transfer of companion case from Central District of California, and establishment of MDL 296 for all further proceedings in Cement & Concrete Antitrust Litigation.

Sep 23 15 Pretrial Order No. 14 and Schedules A & B. FILED Sep 22, 1977.

Oct 3 51 Affidavit of Peter K. Shack. (all actions).

Nov 2 159 Deft California Portland Cement Co.'s Answers & Objections to Pltfs' Fourth Consolidated Set of Interrogatories to All Cement Defts (All Actions).

Nov 9 201 Reply of Deft Southdown, Inc. to Pltfs' Motion to Compel Documents pursuant to Pltfs' Fifth Request for Production of Documents (All Cases).

Nov 14 221 Response of Concrete Defts to Pltfs' Motion to Compel Documents Pursuant to Fifth Request for Production of Documents.

Dec 14 285 Pretrial Order No. 17.

1978

Jan 26 348 Certain Pltfs' Statement of Disputed Facts Pursuant to Local Rule 11(h) for Consideration in Connection with Defts' Motion for Summary Judgment (CIV 76-680, 76-827, 76-769, 76-814, 76-827, 76-913, 76-914, 76-923, 77-48, 77-49 & 77-393).

Jan 26 349 Statement of Stipulated Facts Between Certain Pltfs and Cement Defts Pursuant to Local Rule 11(h) (CIV 76-680, 76-710, 76-769, 76-814, 76-827, 76-913, 76-914, 76-923, 77-48, 77-49 and 77-393).

Feb. 7 356 PRETRIAL ORDER NO. 19 that Pretrial Order 17 entered on Dec 13, 77, is hereby vacated and shall have no further force or effect, etc.

Mar 3 417 PRETRIAL ORDER NO. 20; that Defts' motions for extension of time are granted & defts shall have thru May 3, 78 to respond to Pltfs' Amended Motion for Class Certification;

Mar 22 479 PRETRIAL ORDER NO. 21.

Mar 22 480 Privileged and Confidential (SEALED)—copy of the sole document in possession,

custody or control of any of the said defts which purports to constitute an agreement providing for contribution or indemnity with respect to payment of any money judgment which might be entered in these coordinated cases.

May 9 548 PRETRIAL ORDER NO. 23; that Defts' motions for summary judgment are taken under advisement; that motion to compel the production by certain pltfs of documents prepared by or on behalf of the Federal Trade Commission is taken under advisement.

May 12 551 PRETRIAL ORDER NO. 24: Order that Certain Defts' motion for summary judgment is Denied; that cement defts' motion to compel the production of certain documents.

Jul 10 579 PRETRIAL ORDER NO. 26; that Defts' motion for permanent injunctive relief prohibing compliance by the custodian of the pltfs' document depository with a Federal Trade Commission subpoena duces tecum is Granted; that the Attorney Gen. of the State of Arizona is permanently enjoined from producing any documents to the Federal Trade Commission in response to said subpoenas duces tecum in accordance with the formal written injunction issued this day.

Jul 19 589 PRETRIAL ORDER NO. 27. Order pursuant to pltfs' motion questions may be asked in depositions covering the subjects contained in this Order.

Aug 10 609 Joint Response to Pltfs' Sixth Request for Production of Documents and Seventh Set of Interrogatories. (All actions).

Sep 11 652 PRETRIAL ORDER NO. 28. Order that pltfs file any motion to compel re their 6th

request for production of documents and 7th set of interrogatories on or before Sep 8, 78.

Oct 13 688 PRETRIAL ORDER NO. 30.

Nov 30 727 PRETRIAL ORDER NO. 31. Order that Defts' motion for continuance of hearing is Granted & pretrial conference continued to Mar 6, 79, at 9:30 A.M.; that Motion for Class Certification shall be heard on Mar 6, 79, at 9:30 A.M.

1979

May 15 854 Motion for Clarification of Definition of National Cement Class and Notice of Motion.

Jun 15 872 PRETRIAL ORDER NO. 33 (FILED Jan 12, 79).

Jul 18 915 PRETRIAL ORDER NO. 34.

Jul 31 921 Lodging of Settlement Agreement with Deft River Cement Co. (All Actions).

Sep 17 954 Affidavit Re: Pltfs' Joint Motion to Compel Answers to Pltfs' 8th Set of Interrogatories. (All Actions).

Oct 4 — Lodge Settlement Agreement with Deft Phoenix Redi-Mix Co., Inc.

Oct 29 984 PRETRIAL ORDER NO. 37.

Oct 31 987 PRETRIAL ORDER NO. 36.

1979

Jan 10 1069 PRETRIAL ORDER NO. 38.

1980

Jan 15 1070 PRETRIAL ORDER NO. 39.

Feb 4 1083 PRETRIAL ORDER NO. 40. that the next Pretrial Conference is hereby set for Apr 20, 80, at 9:30 A.M.

Feb 4 1084 PRETRIAL ORDER NO. 41.

Feb 29 1101 PRETRIAL ORDER NO. 42 (Motions for Protective Orders)

Mar 31 1143 Pltf's Thirty Third Notice of Depositions (Robert W. Vail)

Apr 22 1168 PRETRIAL ORDER NO. 43.

4-29-80 1171 PRETRIAL ORDER NO. 44

May 9 1174 SETTLEMENT ORDER NO. 1.

May 16 1177 Motion for Preliminary Approval of Proposed Settlement with Deft River Cement Co.; Approval of Form of Cement Class Notice and Authorization for Dissemination of Notice to the National Cement Class and California and Oregon Governmental Classes (Filed Under Seal).

5-23-80 1179 PRETRIAL ORDER NO. 45.

5-28-80 1182 SETTLEMENT ORDER NO. 2.

6/25/80 1215 Plntfs Thirty-Fifth Notice of Depositions.

7/8/80 1228 SETTLEMENT ORDER # 3.

7/8/80 1229 SETTLEMENT ORDER # 4.

7/8/80 1230 Partial Final JUDGMENT pursuant to rule 54(b), Federal Rules of Civil procedure, dismissing settling dfts and approving proposed plan of distribution.

7/21/80 1234 PRETRIAL ORDER # 49.

7/21/80 1235 PRETRIAL ORDER # 50.

7/30/80 1237 PRETRIAL ORDER # 51. Re: Stip Protective Ord for class list materials subm by Florida Mining & Materials corp.

8/4/80 1238 PRETRIAL ORDER # 52. Re: Stip Protective Order for Class list materials subm by Virginia Concrete, Inc. (see order for particulars).

8/4/80 1239 PRETRIAL ORDER # 53. RE: Discovery.

8/5/80 1240 PRETRIAL ORDER # 54. Re: Stip Protective Order for Class List Materials Subm by Builders Supply Co. of Houston.

8/12/80 1253 SETTLEMENT ORDER # 5. Re: Ready-Mix Claims Approval

8/15/80 — LODGED—Settlement Agreement Gifford-Hill & Co, Gifford-Hill Portland Cement Co., Amcord, Inc.

8/15/80 — LODGED—Settlement Agreement w/Amcord, Inc.

8/25/80 1277 PRETRIAL ORDER NO. 55 re: Stip Protective Ord for class list materials subm by Gulf Coast Cement Co. (see order for particulars).

9/9/80 1297 PRETRIAL ORDER #56. Re: Stip Protective Ord for Class List Materials Subm by Rinker Materials Corp. (For particulars see order).

9/15/80 1300 PRETRIAL ORDER #57. Re: Recommendation of the Magistrate.

9/18/80 — LODGED—Motion for ord settg hrg on 9/30/80: Plntfs Mtn for 1) Preliminary approval of settlement Agreements w/Dfts California Portland Cement Co. Southdown Inc, and Southwestern Portland Cement Co, and; 2) Approval of revised form of cement class notice.

10/2/80 1329 SETTLEMENT ORDER #6: re: 1) Prelim Approval of Settlement Agreement w/dft

Amcord, Inc. 2) Approval of form of suppl notice for dissemination to the Arizona ready-mix class. (fld 9/30/80)

10/2/80 1330 PRETRIAL ORDER #58: Re: Magistrate for Discovery Matters. (see order for particulars).

10/20/80 1347 PRETRIAL ORDER NO. 60. Re: 1) Prelim approval of proposed Settlement w/dfts Gifford-Hill, & Co., Gifford-Hill Portland Cement Co., & Amcord, Inc.; Calif Port Cement Co; & Southdown, Inc. & Southwestern Portland Cement co; 2) Revised form of Rule 23(c) and 23(e) Class Notice; and 3) Authorization for Dissemination of Ntc National Cement, Calif Gvt & Oregon Govt Classes & Publication thereof. (See order for particulars).

11/5/80 1357 PRETRIAL ORDER NO. 59. Re: 1) Discov matters, 2) Sched prelim approval of Gifford-Hill, Amcord, Calif Portland, Southdown & SoWestrn settlements, 3) Sched class notice. (See order for particulars).

11/6/80 1359 PRETRIAL ORDER NO. 62. Re: stip & ord re advance from River Settlement Fund for costs of class notice.

12/9/80 1383 PRETRIAL ORDER 63. RE: Kaiser Cement Corp Discovery.

12/16/80 1401 SETTLEMENT ORDER NO. 10. Re: Amcord Inc. Ready-Mix Settlement Approval. (for particulars see order in file).

12/16/80 1402 SETTLEMENT ORDER NO. 11. Re: Amcord, Inc. Ready-Mix Settlement Allocation Approval.

12/16/80 1403 SETTLEMENT ORDER NO. 12. Re: Escrow Agent Fee Approval.

1/6/81 1429 PRETRIAL ORDER NO. 64. ORDERED—consideration of mtn (Columbia Building Materials, Inc. to clarify or amend definition of national cement class) is deferred.

1/14/81 1451 PRETRIAL ORDER NO. 65.

2/5/81 1488 PRETRIAL ORDER #67. re: 1. Determination that ntc was given to potential members of Natl Cement, Calif Gvtl & Oregon Gvtl Classes in compliance w/PTO 60; and 2. Final approval of settlements w/dfts River Cement Co., Gifford-Hill Portland Cement Co. & Amcord, Inc., Southdown, Inc. and Southwestern Portland Cement Co., & Calif Portland Cement Co.) ORDERED—1) rpt made in open crt on 2/3/81 & the affid of Kirk A. McKinney (1/26/81), as to dissemination of the class notices, are accepted & approved. 2) Proposed settlements w/settlg dfts, as set forth in settlement agreements, are just fair resnbl & adequate uncer circumstances of this actn, & satisfy the prerequisites to approval thereof under Rule 23(e) FRCP. 3) Purs to provisions of settlement agreements & class ntc, ea plntf & member of the Cement Classes (except those persons the crt has determined to have fld timely written elections t/b excluded), is deemed to have released &/or covenanted not to sue settlg dfts, etc. 4) All attys fees, etc incurred in connectn w/settlements (doc # 1488, PTO # 67, continued) as approved by crt shall be chrgd agnst settlement funds as directed. 5) Crt finds no just reason for delay in entering final jdgms as to

settlg dfts & crt retains jurisdctn in certain areas. (entry has been shortened for docketing purposes—see order for details).

2/5/81 1489 JUDGMENT. Re: Partial final jdgm purs to Rule 54(b) dism dfts Southdown, Inc. & Southwestern Portland Cement Co w/prej.

2/5/81 1490 JUDGMENT. Re: Partial final jdgm purs to rule 54(b) dism dft California Portland Cement Co. & its unincorp division Arizona Portland Cement Co w/prej.

2/5/81 1491 JUDGMENT. Re: Partial final jdgm purs to rule 54(b) dism dft River Cement Co w/ prej.

2/5/81 1492 JUDGMENT. Re: Partial final jdgm purs to rule 54(b) dism dfts Amcord, Inc., Gifford-Hill & Co., Inc. & Gifford-Hill Portland Cement Co. w/prej.

2/20/81 1496 JUDGMENT: Re: Partial final jdgm purs to Rule 54(b), FRCP, Dism Amcord, Inc. w/ prej and approving proposed plan of distribution. ORDERED.

2/24/81 1516 PRETRIAL ORDER NO. 69.

2/27/81 1522 PRETRIAL ORDER #70.

3/4/81 1530 PRETRIAL ORDER # 71.

4/2/81 1565 PRETRIAL ORDER # 72.

4/14/81 1572 SETTLEMENT ORDER # 16 (Re: 1—Ready-Mix Claims approval.

4/14/81 1575 PRETRIAL ORDER # 73. Re: Definition of National Cement Class.

5/ 4/81 1600 PRETRIAL ORDER #75. Re: Appntmnt of Agent for Plntf Classes in Penn-Dixie Industries Inc. Chapter 11 Bankruptcy Proceedings.

5/26/81 1625 OPINION AND ORDER re: Dfts mtn to recuse the Honorable CAM. ORDERED—I hereby recuse myself fr fur participation in the cement portion of this litigation. Whether ruling should also apply to concrete portion—crt will entertain proposals or mtns approp.

6/ 3/81 1640 PRETRIAL ORDER # 76. Re: Severance of Ready-Mix Claims.

6/ 3/81 1641 PRETRIAL ORDER # 77. Re: Certification of Interlocutory Appeal.

9/28/81 1720 SETTLEMENT ORDER # 20: Re: Ready-mix claims approval.

10/23/81 1739 PRETRIAL ORDER NO. 78.

11/2/81 1748 PRETRIAL ORDER # 80: RE: 1) Prelim approval of proposed settlement w/dfts Northwestern States Portland Cement Co., Atlantic Cement Co & Penn-Dixie Ind. 2) For of Rule 23(e) Class Ntc & 3) Auth for Dissemination of ntc to Natl Cement, CA Gvt & Oregon Gvtl Classes & publication of Summary Ntc (1734).

1982

1/19/82 1772 Affid of Kenneth R. Reed.

2/ 4/82 1777 Partial final JUDGMENT purs to rule 54(b) dism dft Northwestern States Portland Cement Co w/prej.

2/ 4/82 1778 Partial final JUDGMENT purs to rule 54(b) dism dft Atlantic Cement Co. Inc w/prej

11/8/82 1928 Ntc of srvc of objctns & rspns of Portland Cement Assn to Plntfs 16th Set of Interrogs.

1983

7/ 1/83 1999 Pltfs 34th Revised Service List for Plaintiffs' Counsel.

8/ 3/83 2016 MDL ORDER Filed 7-18-83. As result of Supreme Crt's ruling, Hon CAM's recusal stands & ORDERED litigation is hereby reassigned to the Hon. Manuel L. Real from Central Dist. of Calif, sitting in Distr of AZ, purs to an intracircuit assignmt under 28:292 (b) for remainder of the coordinated or consolidated PT proceedings purs to 28:1407.

8/17/83 2022 ORDER (MLR)—w/i 20 da after date of ord, cnsl for ea side shall subm to crt a joint summary stmnt listing all impt rulings made by CAM, both procedural & substantive; w/i 20 da cnsl for ea side shall also subm joint summary stmnt of discov conductd to date; w/i 20 da cnsl for ea side shall subm a joint summary listing all pendg mtns (incl mag appeals) fld by cnsl for that side & identifying document # & title of ea such mtn & all rspsv & reply memo; w/i 30 da cnsl for ea side shall file joint narrative summary of this litigation; w/i 30 da cnsl for ea side shall file joint summary stmt settg forth discov curr anticipated; ptys meet & confer & file single joint stmnt covering as many above issues as possible; a PC will be hld on 9/9/83 at 10:00 A.M. crtrm1)

8/17/83 2026 Plntfs 71st ntc of depo of Portland Cement Assn on 10/11/83

9/ 7/83 2046 Plntfs Joint Narrative Summary of Litigation/Summary of Central Facts & Legal Issues

9/20/83 2053 PRETRIAL ORDER NO. 83: (MLR) (re: pretrial sched/trial date)

11/3/83 2285 PRETRIAL ORDER #84: Order the x-claim fld by certn non-settling dfts agnst former dft River Cement Co be dism w/i prej.

11/17/83 2393 PRETRIAL ORDER #85: RE: Stip protective order for Materials t/b produced by Mr. Douglas Queen. (see order for details) (relates to all cases)

11/21/83 2423 Nte of servs of deft Portland Cement Assn't rspnses to pltfs' 40th set of rqsts for admsns. (relates to all cases).

11/25/83 2447 PARTIAL FINAL JUDGMENT AS TO RIVER CEMENT CO.: that all claims pendg agnst River Cement Co. be & hereby dism w/prej & w/o costs. (purs to R54b) cpys pld in related files.

11/28/83 2461 Dfts Motion to Decertify the Plaintiff Classes.

12/15/83 2579 Dfts mtn for partial S/J (re: all claims in coordinated proceedgs brought under Sectn 4 of Clayton Act, 15:15 that are based on purchases of cement/cement-containing products from entities other than (1) dft cement mfg (2) nondft cement mfg alleged to have conspired w/dfts (3) their subsidiaries (ground claims barre by Supreme Crt decision). (relates to all cases)

2/16/83 2616 Pretrial order #86: RE Schedule of Robert W. Clower Deposition:

12/19/83 2630 Ntc of srvc of dft Lone Star Ind rspns/objctn to plntfs. 116th set of req for admissns & 24th set of interrogs (related to all cases).

12/20/83 2656 PRETRIAL ORDER #88: plntfs mtn to inspect/copy Grand Jury investigation (1613) is denied.

1/4/84 2752 Plntfs stmnt of disputed factual issues concerning dfts mtn for partial S/J re Illinois Brick (2579) (relates to all cases).

1/5/84 2764 Plntfs joint oppstn to mtn of dft National Cement for S/J. (orig of Natnls mtn sent to MLR - not revd as yet) (relates to all cases).

1/9/84 2774 PRETRIAL ORDER #89—RE: Partial Reimbursement of Plntfs Cost-Sharing Fund.

1/24/84 2918 PRETRIAL ORDER #91: ORDER in trial of all pendg actns, issue of violation shall decided first & if necessary, all other issues, incl impact/damages sustained shall be decided by same jury. (fld 1/13/84) (relates to all actns).

1/24/84 2919 PRETRIAL ORDER #92: ORDER: Dfts mtn to decertify is granted & the National Cement Class is decertified. Fur ord Dfts mtn to decertify is denied as to California and Oregon Governmental classes. Fur ord the decertification in no way affects admin of prev finalized settlmnts as to dfts listed in this order.

2/6/84 2982 PRETRIAL ORDER #92: re: National Gypsum co Bureau of Mines Rpts.

2/6/84 2983 PRETRIAL ORDER #93: re: dfts mtn to preclude, etc.

2/2/84 2943 JUDGMENT (pur 54(b): Dft Dundees mtn for S/J havg been grntd, jdgm be entd in favor of Dft Dundee & agnst plntfs.

2/6/84 2984 PRETRIAL ORDER #94: re PC hld 1/23/84: ORDER: denyg dfts Centex, National, Filt mtns for S/J & grntg dft Dundee mtn for S.J.

2/13/84 3005 PRETRIAL ORDER #95: re sched of Roger Blair & James McClave Depos.

2/16/84 3038 PRETRIAL ORDER #96: re: mtn to preclude.

2/21/84 3054 Plntfs Condtnl Joint mtn for prelim approval of Settlement Agreement

2/21/84 3058 Decln of Michael R. Granen in oppstn to dfts mtn for partl S/J (2579) (77-758).

2/21/84 3059 Affid of Bill Carson re #2579 (fld 2/17/84).

3/20/84 3167 Dfts mtn to Strike Certain Pendent State Claims.

3/22/84 3171 PRETRIAL ORDER #97: (re: revised pretrial schedule & trial date.

3/26/84 3199 Plntfs objctns to dfts proposed orders grntg their Illinois Brick mtns

4/16/84 3312 PRETRIAL ORDER #98: (Re: Illinois Brick - Oregon & California): 1) Dfts mtn for S/J (2579) agnst State of Oregon to dism all fed claims for damages based on purchases of cement/cmnt products fr any entity *not* a current dft is grntd, & all such claims are dism w/prej. 2) Dfts mtn for S/J (2579) to dism all fed claims for damages as to Ore gvnmntl entity *not* listed in this order is granted & all such claims are dism w/prej (see ord for list**. 3) Dfts mtn for S/J (2579) agnst plntf State of CA to dism all fed claims for damages based on cement/cmnt products frm entity not a conspiring cement mfgr or an entity controlled by such mfgr is grntd & all such claims are dism w/prej. 4) Dfts mtn for S/J (2579) to dism all fed claims for damages as to Calif gvnmntl entity not listed in this ord is grntd & all such claims are dism w/prej. **(list revised see #3314) (77-56, 77-758).

4/16/84 3315 PRETRIAL ORDER #99: (Re: Illinois Brick - plntfs Talley, Smith, Green, Northern, Perry, Hendricks, Larsen, New Pueblo, Carson:

4/16/84 3316 PRETRIAL ORDER #100: (RE: Illinois Brick - State of Colorado):

4/16/84 3317 PRETRIAL ORDER #101: (RE: Illinois Brick - Smith & Green, State of KS, State of Ala, State of Fla, State of Montana, State of Missouri, State of Neb, State of MN, State of TX, State of LA, Hechinger Co, City of Austin:

4/16/84 3318 PRETRIAL ORDER #102: (re: Illinois Brick - Rubenstein Development, Rubenstein, Central Palm, Leavell, Brown, Buck Brown Constructg, & State of AZ):

4/20/84 3353 PRETRIAL ORDER NO. 103.

5/8/84 3394 Plntfs Ntc of mtn & mtn for 1) prelim apprvl of sttlmnt w/dft Keystone Portland Cement Co., 2) vacatg of Natnl Cement Class Decertification w/rspct to Keystone only, 3) contin of stay of Keystones obligations to participate in pretrial & trial proceedgs. (Ntcd for 6/1/84 at 10AM) (relates to all actns.)

5/8/84 3395 Plntfs memo in support of #3394. (relates to all actns)

5/9/84 3397 PRETRIAL ORDER #105: re: pretrial conf hld April 26-27, 1984. The issues of trial venue, transfers for trial & possible use of video equipment for trial shall be fur considered in chmbrs meetg w/plntfs & dfts committees on 5/9/84 at 1:30PM in LA. Fur ord dfts claim of atty-client privlge is overruled & plntf mtn to compel re Eastman documents (3140) is grntd & documents produced by Eastman/fld underseal/be produced to plntfs. Fur ord dfts mtn to strike penden state law claims (3167) is grntd & the pendent state law claims of plntfs State of Alabama, State of Calif, State of Fla, State of Minnesota, State of Missouri & State of Montana are

dism w/o prej. Fur ord State of CA's mtn for ord to com (22, 77-758) is denied. Fur ord dft Columbia's mtn to preclude (3297) is denied. Fur ord Dft National Cements mtn in limine to exclude (3238) is denied.

5/18/84 3401 PRETRIAL ORDER #106.

6/27/84 3447 PRETRIAL ORDER #107.

6/27/84 3448 PRETRIAL ORDER #108.

7/23/84 3472 Plan of Distribution Proposed by State of California (relates to all actns).

8/3/84 3498 PRETRIAL ORDER #109: RE PARTIAL REIMS OF PLNTFS COST-SHARING FUND:

8/3/84 3499 PRETRIAL ORDER #110: re pretrial conference hld 6/18/84: ORDER:

8/3/84 3500 PRETRIAL ORDER #111 re: Partial reimbsmnt of plntfs cost-sharing fund: ORDER:

9/ 5/84 3582 PRETRIAL ORDER # 112.

9/ 5/84 3583 PRETRIAL ORDER # 113.

9/14/84 3593 PRETRIAL ORDER # 114.

9/14/84 3594 PRETRIAL ORDER # 115: re ntc to members of calif govmntl class.

9/14/84 — ME: PRETRIAL CONFERENCE HELD. Tom Catania, for plntf State of MN, reported to the Crt on settlements w/Martin Marietta & OKC—Crt signed stips to dism in open crt.

10/9/84 3651 PRETRIAL ORDER # 116: Re Ntc to members of Calif class.

10/9/84 3652 PRETRIAL ORDER # 117: Re Cement Fee Applications.

10/30/84 3691 Plntfs State of CA mtn for Prelim Apprvl of proposed settlement btween plntf State

of CA & dfts Portland Cement Assn, Kaiser, General Portland, Lone Star Ind, Flintkote, Monolith & Ideal Basic (77-758)

10/31/84 3707 ORDER: the crt prelim apprvs the settlement as to the California Class; the proposed form of class ntc & sched for disseninmation & for final apprvl of settlement shall be agreed upon by State of CA & dfts & be subm to crt for apprvl on/bf 11/15/84. (re: 77-758)

10/31/84 3709 PRETRIAL ORDER # 118: re: PC hld 10/12/84.

11/ 9/84 — ME: hrg re Distributn of Net Settlement Funds & Objetns thereto, # 3702, Plntfs mtn for approval, & Dfts App for entry of order re doc retention. Joe Cooper, Ken Reed, Michael Spiegel, Christopher Kane, Carl Divelbiss, Dave Leonard pres for various plntfs; Philip von Ammon for dfts. Motion # 3702 argued. ORDER: granting # 3702. Plans of Distributn argued. Plntfs will prep approp ord. Inclusion of Arizona Redi-Mix Claims, Slump Block and Smith & Green Claims taken U/A. Dfts app for entry of ord argued. ORDER: Plntfs to designated which of dfts docs are t/b retained, dfts to turn said docs over to plntfs & plntfs will stpre them at no expns to dfts. Dfts will subm an amended ord to crt for approvl. The next PC will be hld on 12/7/84 at 10 AM in PHX.

11/9/84 3726 ORDER # 119: re procedures in dissemination of ntcs.

11/19/84 3744 Motion of State of CA for: 1) Apprvl of form of class settlement Ntc; 2) apprvl of form of CA Atty Gen letter; 3) Authorizatn to mail ntc & letter; 4) apprvl of sched for class settlemnt. (77-758)

12/7/84 3770 REPORTERS TRANSCRIPT OF PROCEEDGS of 11/9/84

12/20/84 3790 PRETRIAL ORDER # 120: Re Sched for further briefg re fee applicatns.

1/4/85 3796 PRETRIAL ORDER # 121, Re: Schedule for Resolving ord on plan of distributn.

1/23/85 3811 PRETRIAL ORDER # 122, Re: Plan of Distrbtn of the Net Settlement Fund: ORDRD tht Dstrbtn of the Net Sttlmnt Fund will be (see ordr for fur detls) 6) The mtn of pltf AZ Slump Block Inc to set aside ordr dtd 1/21/84 or altrntv, to amend said ordr is grntd to extnt tht it clarifies the 11/21/84 ordr to make clear tht clms based on direct purchases of cement or cement-containing prodcts will b/allwd, sbjct to vrfctn by the normal claims pressng procdr. Clms based upn a refusl to deal not b/allwd. Mtn of pltf Smith & Green Corp Set aside ordr dtd 11/21/84 or alt to amnd said order is grntd to extnt tht it clarfs the 11/21/84 ordr to make clear that clms basd on dret purchses of cement or cement-containing prodct will pressng predr. Clms based upn a refsl to b/allwd. sbjct to vrfctn by normal claims deal not b/allwd. Tht prtn of Crt's 11/23/84 ordr prvdng that AZ Ready-Mix Co are included in pltf class prvsly certfd hereing & are entitld to share in dstrbtn of the Net Sttlmnt Fund is hereby affrmd. Mtn of pltf State of AZ "For Stay of Ntc to Clmnts Pndng Appeal" is denied. On or b/f the day tht Jdgmnt is entrd on this ordr a sprvded below, Ntc of the apprvd plan of dstrbtn in the form attchd hereto as xhbt A shl b/dsseminated by 1st Class US Mail to ea clmnt in

this ltgtn. Hereby Crtfd tht there no just reason for delay in entry of jdgmnt upn this ordr. Intrsts of just will b/best srvd by expdtng any appeal whc may b/taken fr this ordr. FUR ORDRD tht crt exprssly drcts entry of fnal jdmnt upn this ordr pursnt to R53(b) FRCP, NLT 10 days aftr entry of this ordr.

1/1/85 3809 Class members ARC America Corp & subsidiaries objctns to proposed form of PTO re plan of dstributn of net settlement fund. (relates to all actns)

1/23/85 3811 PRETRIAL ORDER # 122. Re: Plan of Distrbtn of the Net Settlement Fund: ORDRD tht Dstrbtn of the Net Sttlmnt Fund will be (see ordr for fur detls) 6) The mtn of plntf AZ Slump Block Inc to set aside ordr dtd 1/21/84 or altrntv, to amend said ordr is grntd to extnt tht it clarifies the 11/21/84 ordr to make clear tht clms based on direct purchases of cement or cement-containing prodcts will b/allwd, sbject to vrfctn by the normal claims pressng procdr. Clms based upn a refusl to deal wi not b/allwd. Mtn of pltf Smith & Green Corp Set aside ordr dtd 11/21/84 or altrntv to amnd said ordr is grntd to extnt tht it clarfs the 11/21/84 ordr to make clear that clms basd on drct purchses of cement or cement-containing prodcts will b/allwd. sbjct to vrfctn by normal claims pressng prcdr. clms based upn a rfsl to deal will not b/allwd. Tht prtn of Crt's 11/23/84 ordr prvdng tht AZ Ready-Mix Co are inclded in pltf class prvsly crtfd herein & are entitld to share in dstrbtn of the Net Stllmnt Fund is hereby affrmd. Mtn of pltf State of AZ

"For Stay of Ntc to Clmnts Pndng Appeal" is denied. On or b/f the day tht Jdgmnt is entrd on this ordr a sprvded below, Ntc of the apprvd plan of dstrbtn in the form attchd hereto as xhbt A shll be/dsseminated by 1st Class US Mail to ea clmnt in this ltgtn. Hereby Crtfd tht there no just reason for delay in entry of jdgmnt upn this ordr. Intrsts of justc will b/best srvd by expdtng any appeal whc may b/taken fr this ordr. FUR ORDRD tht crt exprssly drcts entry of fnal jdgmnt upn this ordr pursnt to R53(b), FRCP, NLT 10 days aftr entry of this ordr.

3812 Pltf., St. of AZ, Amended Notice of Appeal fr DC # 3750 and 3811 and the subsequent fnal jgmt to be issued by 2/4/85.

3817 JUDGMENT: ORDRD & ADJ tht dstrbtn of the Net Sttlmnt Fund will b/pro-rata alletn of (See JD for fur detls) IT IS FUR ORDRD & ADJ tht the Mtn of Pltf AZ Slump Block Inc to (see JD for fur detls) FUR ORDRD & ADJ tht the Mtn of Pltf Smith & Green to (See JD for fur detls) FUR ORDRD & ADJ tht portion of Crt's 11/23/84 ordr prvding tht AZ Ready-Mix Co are inclded in pltf class previsly crtfd herein & are entitld to share in dstrbtn of Net Sttlmnt Fnd is hereby affrmd. FUR ORDRD & ADJ (See JD for fur dscrptn) FINALLY ORDRD & ADJ tht this jdgmnt b/entrd pursnt to Rule 45 (b), FRCP.

3819 Pltf, St. of Calif., Notice of Appeal fr DC # 3817. ($70pd)(CA-85-).

85 3833 (Filed 2/19/85) State of Alabama Notice of Appeal fr DC # 3811. (CA-85-).

85 3834 (Filed 2/19/85) State of Minnesota Notice of Appeal fr DC # 3811. (CA-85-).

IN RE CEMENT AND CONCRETE ANTITRUST LITIGATION, No. 84-2865 (9th Cir.)

1985

Jan. 4 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSELS.

1986

June 9 Filed Order (PREGERSON, POOLE & NOONAN, CJJ) Judges Pregerson and Noonan having recused themselves, these appeals are removed from the calendar for 6/9/86, in S.F. They will be recalendared, befor any panel at the earliest convenience of the court. tsp

CALENDARED San Fran SEP 30 1986

Sept 30 Filed Order (WALLACE, HUG, BRUNETTI, (CJJ): Submission is deferred for seven (7) days . . . (please see case file) . . . The submissions will be by simultaneous letters of not over five pages.

1987

MAY 27 ORDERED OPINION (WALLACE) FILED & JUDG. TO BE FILED & ENTD.

MAY 27 FILED OPINION - AFFIRMED.

MAY 27 FILED AND ENTERED JUDGMENT. -ot-

Jun 11 Filed aplt's petition for rehearing & suggestion for rehearing en banc. 06/10 (Panel & Active Judges) -ot-

Jun 12 Filed aplt's (STATE OF AZ) petition for rehearing & suggestion for rehearing en banc. 06/10 (Panel & Active Judges) -ot-

1988

Feb 9 Filed Order (Wallace, Hug, Brunetti) Petition for rehearing are rejected and suggestion for rehearing en banc are rejected. EM

MAY 5 Filed Aplt's Notice of Appeal to the U.S. Supreme Court.

IN RE CEMENT AND CONCRETE ANTITRUST LITIGATION, No. 85-1670 (9th Cir.)

1985

FEB 22 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSELS.

Mar. 26 Filed, in 84-2865, order (Sneed) the order of January 17, 1985 to show cause is vacated. The motions by the State of Arizona, California and Minnesota for consolidation of these appeals is granted. Appeals No. 84-2865, 85-1670, 85-1722, 85-1723, 85-1724 and 85-1787 are consolidated.

1986

June 9 Filed in 84-2865, order (PREGERSON, POOLE & NOONAN) Judges Pregerson and Noonan having recused themselves, these appeals are removed from the calendar for 6/9/86 in San Francisco. They will be recalendared before any panel at the earliest convenience of the court. tsp (db)

SEPT 30 Filed order (WALLACE, HUG, BRUNETTI, CJJ): Submission is deferred for seven (7) days . . . (see case file) rtr

1987

MAY 27 ORDERED OPINION FILED & JUDG. TO BE FILED & ENTD.

MAY 27 FILED OPINION - AFFIRMED.

MAY 27 FILED AND ENTERED JUDGMENT. -ot-

Jun 12	Filed in 84-2965 aplt's (STATE OF AZ) petition for rehearing & suggestion for rehearing en banc. 06/10 (Panel & Active Judges) -ot-
1988	
Feb. 9	Filed in 84-2865 Order (Wallace, Hug, Brunetti): Petitions for rehearing is denied and suggestion for rehearing en banc is rejected. EM
MAY 5	Filed in 84-2865, Aplt's Notice of Appeal to the U.S. Supreme Court. cmk

(Names and Addresses of Counsel
Appear on Signature Page.)

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

IN RE CEMENT AND CONCRETE ANTITRUST LITIGATION	MASTER FILE
THIS DOCUMENT RELATES TO:	NO. CIV. 76-488A PHX CAM
ALL ACTIONS	

NOTICE OF MOTION AND PLAINTIFFS' AMENDED MOTION FOR CLASS ACTION CERTIFICATION

(Filed Sep 23, 1977)

PLEASE TAKE NOTICE that at the Pretrial Conference to be set pursuant to the schedule fixed by Pretrial Order No. 11, paragraph 2 (dated July 5, 1977), plaintiffs will appear before the Honorable Carl A. Muecke, United States District Judge, at the courtroom usually occupied by him in the United States Courthouse, Federal Building, 230 First Avenue, Phoenix, Arizona, and will move this Court for an order pursuant to Rule 23(c)(1), Federal Rules of Civil Procedure, determining that the actions listed below shall be maintained as class actions on behalf of the following classes:

I. *National Cement Class:* All public and private entities within the United States (except the United States of America, defendants, their subsidiaries, affiliated business entities and agents, other private business entities

that produce or produced cement for sale as cement, and members of the California and Oregon Governmental Classes) that have purchased for delivery within the United States cement from any cement manufacturer or producer or its parent, subsidiary or affiliated business entities at any time since January 1, 1968.

Representative Parties	Civil Action No.
State of Arizona	76-672 PHX CAM
Rubenstein Development Company, and Harry Rubenstein	76-710 PHX CAM
The Leavell Company Buck Brown Contracting Company, Inc.	76-814 PHX CAM
Hechinger Company	76-853 PHX CAM
Katterjohn Concrete Products of Owensboro, Kentucky, Inc., The Sta-Dri Company	76-854 PHX CAM
York Concrete Co., York Concrete, Inc.	76-914 PHX CAM
Picou's Builders Supply, Inc.	76-926 PHX CAM
State of Colorado	76-929 PHX CAM
City of Austin, Texas	77-54 PHX CAM
Northern Materials, Ins.	77-580 PHX CAM
State of Kansas	76-603 PHX CAM
Smith & Green Corp. Allen R. Smith Raymond Green	77-717 PHX CAM
Colorado Concrete Mfg. Co.	77-720 PHX CAM
Walter K. Lauren dba Thriftway Lumber Thriftway Lumber Company	77-724 PHX CAM

II. *California Governmental Class:* The State of California and its respective cities, counties, public utility districts, and other public entities and political subdivisions that have purchased cement or cement-containing products from any cement manufacturer or producer or its parent, subsidiary or affiliated business entities at any time since January 1, 1968.

Representative Parties	Civil Action No.
State of California	76-4073 FW (C.D.Ca.)

III. *Oregon Governmental Class:* The State of Oregon and its respective cities, counties, public utility districts, and other public entities and political subdivision that have purchased cement or cement-containing products from any cement manufacturer or producer or its parent, subsidiary or affiliated business entities at any time since January 1, 1968.

Representative Parties	Civil Action No.
State of Oregon	77-56 PHX CAM

IV. *Arizona Ready-Mix Class:* All public and private entities (except the United States of America, defendants, their subsidiaries, affiliated business entities and agents) that have purchased for delivery within the State of Arizona ready-mix concrete, grout, rock products or cement-containing products from defendants, or their parent, subsidiary or affiliated business entities at any time since January 1, 1968.

Representative Parties	Civil Action No.
State of Arizona	76-672 PHX CAM
Bill Carson Construction Company Bill Carson Construction Company, Inc.	76-680 PHX CAM

Rubenstein Development Co., Harvey Rubenstein, and Central Palm Plaza	76-710 PHX CAM
The Leavell Company, Buck Brown Contracting Company, Inc.	76-814 PHX CAM
Wooldridge Construction Company	76-913 PHX CAM
York Concrete Co. York Concrete, Inc.	76-914 PHX CAM
Mayor Construction Corp.	77-48 PHX CAM
Dura Development, Inc. Henry J. Mueller and Gerald E. Schneider d/b/a Pacific Builders Pacific Builders, Inc. H and L Financial Corporation	77-732 PHX CAM

This motion is based upon the files and records in these proceedings, the memorandum in support of plaintiffs' original motion for class action certification, and the accompanying supplemental memorandum.

DATED: September 21, 1977

Respectfully submitted,

JOSEF D. COOPER
FRANCIS O. SCARPULLA
TRACY R. KIRKHAM
COOPER & SCARPULLA
300 Montgomery Street, Suite 600
San Francisco, CA 94104

For all of the above reasons, and for the reasons set forth in Memorandum In Support Of Plaintiffs' Motion For Class Action Certification (dated April 1, 1977), plaintiffs respectfully request that this Court certify these actions to proceed as class actions on behalf of the classes described in plaintiffs' Amended Motion.

DATED: September 21, 1977

Respectfully submitted,

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Co-lead Counsel for Plaintiffs

By /s/ Josef D. Cooper
Josef D. Cooper
On behalf of all plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

IN RE CEMENT AND CONCRETE ANTITRUST LITIGATION	)	MASTER FILE
THIS DOCUMENT RELATES TO:	)	NO. CIV. 76-488A PHX CAM
ALL ACTIONS	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' AMENDED MOTION FOR CLASS ACTION CERTIFICATION

On April 1, 1977, plaintiffs filed their initial motion for class certification, requesting this Court to certify five nationwide and one statewide class of purchasers of cement and cement-containing products. In addition, plaintiffs requested the Court to certify three Arizona classes of purchasers of ready-mix concrete, grout and rock products.

The classes originally proposed by plaintiffs were organized by the traditional and distinct distribution levels present in the industry, and recognized the differing functions performed by the various groups in the chain of distribution. Accordingly, separate classes were suggested for each group in the cement distribution system, i.e., (1) manufacturers of cement-containing products, (2) cement resellers, (3) subcontractors, (4) general contractors, and (5) owner-builders. Similar classes of subcontractors, general contractors and owner-builders were proposed for the claims against the ready-mix defendants.

After discussions among counsel, and with the Court, the Court fixed a schedule for resolution of plaintiff's initial class motion. See Pretrial Order No. 10 (dated May 23, 1977).

On June 9, 1977, the Supreme Court issued its opinion in *Illinois Brick Co. v. State of Illinois,* —— U.S. —— (1977); 97 S.Ct. 2061. This decision changed the law with regard to the ability of indirect purchasers of a price-fixed product to recover damages. Although there are exceptions to the general rule, *Illinois Brick* established the basic principle that only those parties who purchased the price-fixed product directly may sue to recover damages sustained on such purchases. Thereafter, plaintiffs temporarily withdrew their motions for class certification, and a revised schedule for class action determination was ordered. See Pretrial Order No. 11 (dated July 5, 1977).

Plaintiffs have now filed their Amended Motion for Class Action Certification. Plaintiffs have requested this Court to certify a nationwide class of cement purchasers, statewide classes of governmental entities in the States of California and Oregon which purchased cement and/or cement-containing products, and an Arizona class of ready-mix purchasers. In essence, the separate functional classes included within plaintiffs' original motion have been coalesced into a nationwide cement class and an Arizona ready-mix class.

Plaintiffs' proposed classes conform with the class certified by Judges Robson and Will in *In re Folding Cartons Antitrust Litigation,* MDL 250 (N.D.Ill.), which class was certified subsequent to *Illinois Brick.* The class certified in *Folding Cartons* is:

> All persons in the United States (excluding Defendants, their subsidiaries, affiliates, or agents), who purchased folding cartons from any of the Defendants in these actions during the period from January 1, 1960 to December 31, 1974.

Included within this class are entities which purchased folding cartons for their own use or for resale. A copy of Pretrial Order No. 20 (dated July 15, 1977) which reaffirms the *Folding Cartons* class certification and denies defendants' motion for Section 1292(b) interlocutory appeal is attached hereto as Appendix I.

As with the *Folding Cartons* class, the national cement and Arizona ready-mix classes would be comprised of all cement and ready-mix purchasers within the respective geographic territories. While individual class members may perform different functions in the cement and ready-mix distribution process, all class members stand in the same position vis-a-vis defendants. Accordingly, the particular nature of any class member's business is irrelevant, since it is only the purchase of cement or ready-mix at elevated price levels which is germane to this litigation.

Certification of the classes requested by plaintiffs would bring all claims before this Court in the most expeditious and economical manner. Such classes would also permit the Court to disseminate a single notice to the members of the functional classes originally urged by plaintiffs. These classes could then prosecute the common issue of defendants' liability in a single proceeding, recognizing that subclasses might be appropriate for apportioning any monies recovered by judgment or settlement.

Plaintiffs also note that legislation has been introduced in both Houses of Congress* which would reverse *Illinois Brick* and return to the prior state of the law. In this event, plaintiffs proposed classes afford the flexibility of a uniform class for the purpose of establishing and computing defendants' total liability, while retaining the Court's ability under Rule 23(c)(1) to create subclasses including indirect purchasers for damages.

Plaintiff's memorandum in support of their original class motion extensively discussed the nature of the cement and ready-mix industries, and demonstrated that these actions satisfied all of the prerequisites and requirements of Rule 23. As is further demonstrated by the *Folding Cartons* opinion attached hereto, these legal principles and authority apply equally to plaintiffs' Amended Motion, and are hereby incorporated herein as though fully set forth. Plaintiffs' original Motion included Affidavits of counsel for the class representatives originally proposed by plaintiffs. Appendix II hereto are the affidavits of counsel for class representatives who were not counsel in these proceedings at the time of plaintiffs' original motion. Attached hereto as Appendix III are Affidavits of each of the proposed class representatives, which are filed pursuant to Pretrial Order No. 13, ¶5 (dated August 22, 1977), in which each class representative acknowledges and accepts his responsibilities and obligations as a class representative.**

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* H.R. 8359 and S.B. 1874.

** The Affidavit of the State of Oregan is being filed directly with the Clerk of the Court

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

THE HONORABLE MANUEL L. REAL, CHIEF,
UNITED STATES DISTRICT JUDGE,
CENTRAL DISTRICT OF CALIFORNIA,
PRESIDING

IN RE CEMENT AND CONCRETE ANTITRUST LITIGATION.	) MDL NO 296) PHX-MLR)) (Filed Dec. 4, 1984)

REPORTER'S TRANSCRIPT OF PROCEEDINGS
Phoenix, Arizona
Friday, November 9, 1984

FLORENCE CARCIA
Official Court Reporter
442-D U.S. Courthouse
312 North Spring Street
Los Angeles, California 90012
213/698-3402

APPEARANCES:

On behalf of the Plaintiffs:

On behalf of the State of California:

GEORGE DEUKMEJIAN, Attorney General
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Deputy Attorney General
PATRICIA CUTLER
OWEN LEE KWONG
WILLIAM CLARK
CHARLES KAGAY
MICHAEL SPIEGEL

On behalf of the State of Minnesota:

THOMAS CATANIA

On behalf of the Defendants:

On behalf of Ideal Basic Industries:

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PAULINE D. FOX

On behalf of the Defendants:

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JOHN J. WALLER, JR.

On behalf of Lone Star:

WILLIAM J. MALEDON
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On behalf of General Portland:

DAVID McATEE
THOMPSON & KNIGHT
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Dallas, Texas 75201

(p. 4) Phoenix, Arizona: Friday, November 9, 1984; 10:00 A.M.

——oOo——

The Clerk: Civil MDG 296. In Re Cement and Concrete Antitrust Litigation.

Hearing regarding the distribution of net settlement funds and objections thereto.

Judge, do you have your calendar?

The Court: Yes.

Mr. Furth: Good morning, your Honor.

The Court: Mr. Furth.

Mr. Furth: My name is Fred Furth, liaison counsel for the settlement class.

If it please the Court, we would have Mr. Cooper give a report, your Honor, on everything that has occurred.

The record is now right to have this hearing, and then we would deal with our four issues, maybe some more.

One would be the settling defendants vs. the non-settling defendants' claims; the second would be the pendant state claims for indirect purchases; third would be the civil penalties issue; fourth would be the Arizona Readimix companies.

Mr. Cooper will give his report at this time, if it please the Court.

The Court: All right.

(p. 5) Mr. Cooper: Good morning, your Honor.

The Court: Good morning.

Mr. Cooper: The first matter, your Honor, I think it is appropriate to take us, is the report which has been made with regard to the procedures employed with regard to the dissemination of notice and the approval of those procedures and the approval of the costs which were expended to disseminate notice.

We have put into the record via the affidavit of Douglas Marshall of my office copies of all of the relevant documents which substantiate that notice was in fact given pursuant to the procedures and as required by the Pretrial Order No. 10, and through the affidavit of Mr. Sontag of the State of California, that the procedures were followed as required by Pretrial Order No. 115 for the California governmental class.

There are attached to Mr. Marshall's affidavit copies of the notice, copies of all the advertisements which were run in the Wall Street Journal, in each of the editions of the Wall Street Journal, the various trade publications, there are copies of the invoices which were

submitted by the various suppliers totaling $66,493.54, together with copies of the checks used to pay those people for the supplies and the servies that were provided.

There is also in Mr. Marshall's affidavit (p. 6) statements with regard to the expenditures of $4,804.55 in costs by my office for various telephone, Xerox, postage, messengers, post office box rental types of costs. These are costs, of course, which were not included in the fee petition which has been filed and were costs which we segregated at the time as being directly related to the preparation of notice and the plan of distribution matters and the contracts between counsel with regard to that, the distribution of draft proposals, draft form of notice, and, of course, the matters as it relates to the submission of those issues to the Court.

We would, therefore, request your Honor at this time approve the dissemination of notice and the expenditure of funds for that purpose. And if that meets with your Honor's approval, I would present to you the original of the form of order which was attached to the moving papers.

The Court: Don't I have a copy here?

Mr. Cooper: We ran out another one. I was not certain if your Honor did.

The Court: I have it here. It has been lodged.

Any objection to the application . . . motion?

All right. That motion is granted and the order is signed.

Mr. Cooper: Thank you, your Honor.

The second matter, your Honor, which I think (p. 7) is probably appropriate, is an update on the written report

which was filed regarding the status of the claims which have been received of the claims processing settlement.

We filed a written report which indicated what the statistics were as of October 29, 1984. That, of course, was prior to the deadline for claims to be received from the members of the California governmental class.

Since that time, there was received approximately 1700 individually numbered claims from members of the California governmental class. That would mean that the claims filed as of this time is 3,564. The dollar value of those claims was not as dramatic a change as the number of claims itself. The dollar value of the settlement claimed is now three million—excuse me—three billion, four hundred eleven million, two hundred fifty-six thousand, eight hundred sixty-nine dollars valued on the claims, based on simply the information on the face of the claims form.

There is, of course, no attempt to verify those amounts or have them audited.

The amount of cement-containing products increased by approximately 70 million dollars as a result of the filing of the California claims, so that the total dollars claimed listed as cement-containing products is $784,650,213.00.

(p. 8) There has been maintained at the claims processing center complete logs of all claims received, communications, of course, with class members. To the extent that there was missing information with regard to claim forms, the procedures necessary to fill in the blanks has been ongoing since our notice has gone out. Nothing,

of course, has been done with regard to the actual auditing of the claims since those procedures potentially are going to be dictated by your Honor's rulings with regard to the plan of distribution.

In essence, though, the status of claims processing is that virtually everything that could be done, although there is some lag with regard to the State of California claims, but virtually everything that could have been done before fixing the plan of distribution and starting the audits process has, in fact, been done.

There are, as I said, complete logs and indexes of all the claims received. We have the ability to identify them or obtain any information that we will need to. And the claims processing procedures and staff are ongoing. And although the annex has now been closed down with the conclusion of the litigating aspects of this case, new space was obtained in the building for the claims processing center. So we can move immediately into the steps necessary to complete that process.

(p. 9) With that, your Honor, we think we are ready to go on to the questions relating to the plan of distribution.

The Court: All right.

Mr. Cooper: Thank you very much.

Mr. Reed: Kenneth Reed, your Honor, plaintiff liaison counsel and counsel for the State of Arizona.

Mr. Furth mentioned four distinct issues that relate to the plan of distribution that were set forth in plaintiffs' proposals relating to the plan of distribution that was

filed with the court back in July. We believe it's logical to treat those four issues in seriatum, one at a time, with the proponents and opponents of each of the issues addressing the matters in turn, if that is accordance with the Court's—

The Court: Well, let me give you my preliminary views. Maybe we can shorten this matter.

From all the papers I have read, my view is that distribution is to be pro rata as to purchases from all defendants settling and non-settling. Indirect purchasers are not included, civil penalties were not included and the Arizona Readimix are not included.

Any recoveries by the State of California and the State of Minnesota will be charged against their interests and any recoveries from the non-settling (p. 10) defendants originally charged against their interests in the fund, and as to all others who may have settled with non-settling defendants who are also in the national class settlement.

Mr. Furth: Could I ask a question so I understand it, your Honor?

The Court: Yes, certainly.

Mr. Furth: Your preliminary view would be that you would be able to claim on the basis of purchasers of cement from both settling defendants and non-settling defendants with no distribution?

The Court: Yes.

Mr. Furth: And then as to the pendant state claim for indirect purchases, that would not be permitted?

The Court: No.

Mr. Furth: And as to civil penalties issues, that would not be permitted?

The Court: That's right.

Mr. Furth: And the areas on Readimix would not be permitted to claim.

The Court: Yes.

Mr. Furth: Then this—as to this California and Arizona—and would there be anyone else—

The Court: Anyone else who settle with non-settling defendants after the decertification of the class, that (p. 11) recovery would be charged against any recovery that they have from the class settlement.

Mr. Furth: In other words, we would go ahead and calculate them on the basis of what they would get, and then we would compare that with what they—

The Court: Got.

Mr. Furth: —did already get. If they got more than that—

The Court: They keep it. If they don't—

Mr. Furth: —then they would be entitled to some additional—

The Court: Yes.

Mr. Furth: Thank you.

The Court: But based upon that—what's left, yes.

Mr. Furth: Right.

Mr. Reed: May I address your Honor's first issue regarding the pro rata distribution based upon all purchases from both settling and non-settling defendants?

I absolutely agree with the thinking underlying the Court's ruling or indication that any recoveries from non-settling defendants will be charged against recoveries that those plaintiffs might otherwise have received from the fund. And I think that goes to the nub of the problem why the weighting should apply to all purchases and that purchases by class members from non-settling defendants (p. 12) should not be given the same weighting as purchases from settling defendants.

By reason of defendants' judgment-sharing agreement, any settlement between the plaintiff or class member and a defendant required, as a term of that settlement, that plaintiffs give up those purchases, that they waive any claim they might otherwise have for joint and several liability for those purchases.

The State of Arizona, for example, purchased cement from both Amcor and California Portland. When we settled as class representative with Amcor and California Portland by reason of the judgment-sharing agreement, we are obligated to waive any future joint and several liability claim based on those purchases. And as a result of that, our claim against remaining defendants was dismissed.

The plaintiffs and class members who have purchased from non-settling defendants have not given that up. In point of fact, named plaintiffs in this litigation have so far recovered something in the order of the magniture of $1.2 million, according to —

The Court: But they are being charged back for that. And I think as one of the conditions of a claim by a purchaser from a non-settling defendant that that person does the same thing that the purchasers from the settling (p. 13) defendants did and that is this is the end of that litigation. So in fairness, everybody is in the same situation.

Mr. Reed: I could not agree more, your Honor, in terms of fairness, requiring everybody to be in the same situation. Those plaintiffs, those class members who have given up any potential claim they have, have nothing more. There are class members in fact, as one of the objecting class members, who filed papers and this is as good an example as any. Its purchases were primarily from Lehigh Portland Cement Co. It is not barred from pursuing those claims. Can't I make that a condition of their claim? I believe the Court has the power to do that, your Honor.

The Court: So that they are in the same situation as anybody else was?

Mr. Reed: The difficulty with that, which is why I think it would be practical ramifications, is that at some point in the future, let's say it happened tomorrow, just for the sake of simplicity, the existing settlement fund were disbursed to all claimants in accordance with the Court's preliminary indications, Fabcom would receive some portion of the money that Amcor and California Portland, for example, paid, even though it never bought from Amcor or California Portland. The Amcor and California Portland purchaser sharing some of (p. 14) their money with somebody like Fabcom who bought from Lehigh.

The next day Fabcom can proceed to sue Lehigh on the basis of its purchases from Lehigh.

The Court: Not if they shared in the settlement.

Mr. Reed: Presumably, your Honor, that Lehigh would be able to raise by way of set-off whatever partial recovery of the damages Fabcom or any other similarly situated class member recovered.

But it would only be by way of settlement. At no point in this litigation have Fabcom's damage claims for purchases from Lehigh been settled. Those are still live claims. And if the existing $50 million settlement funds were disbursed tomorrow, Fabcom and all the other class members who purchased from the five, six or the cement companies in the cement compenies that didn't settle would be entitled to proceed on their claims and you would have the same potential of the double-dipping, if you will, of claims against the existing fund plus this additional $1.2 million that named plaintiffs have already obtained. You have that same potential.

The Court: No, because they would be in the same circumstances as California. They would have to pay back into the fund.

Mr. Reed: The reason why I suggest that we foreclose (p. 15) claims from non-settling defendants now is that payments back into the fund could stretch out over a period of many years.

Fabcom brings its case tomorrow—bring its case the day after it receives the check from this settlement fund, it may two, three, four years before it finally recovers

something on that. And at that stage of the game, it would have to pay some or all of that back into the settlement fund. And that recovery in that subsequent lawsuit would then be divided among the 3,400 existing claimants that Mr. Cooper indicated have already submitted claims.

Rather than having the ongoing administration of the existing settlement fund which that process would require, I suggest that the more equitable and certainly the simpler method is to pay the existing settlement fund proportionately to the claims that have been released. And the claims that have been released are the claims based upon purchases from the settling defendants.

Thank you, your Honor.

The Court: All right.

Mr. Spiegel: May it please the Court, Michael Spiegel on behalf of the State of California.

Speaking on the issue of the settlement fund being distributed to pro rata to everybody, and as your (p. 16) Honor called it, the payments back into the fund for settlement subsequent to the original settlement, on the latter issue it seems to me that that payment back creates a certain amount of unfairness because essentially what it does is it turns the individual settlements that certain named plaintiffs achieved by litigating into class actions recoveries. In other words, take any one of the named plaintiffs that continue to litigate, the State of California, for example. The people who continue to litigate litigated against non-settling defendants, but limited only to purchases from those non-settling defendants.

Mr. Reed pointed out the purchases from the group of nine settling defendants as a condition of the settlement were released as to the—not only as to the settling defendants, but they were also released as to the non-settling defendants.

The next step is—

The Court: No. Except, Mr. Spiegel, that in that situation, what you are saying is that California was then kind of entitled to a free ride, you know, we'll take what you've got and then we'll take the whole enchilada if we get any more.

Mr. Spiegel: No, that's not—

The Court: —and we'll get double recovery.

(p. 17) Mr. Spiegel: Can't possibly get double recovery.

The Court: Why can't you? If you've got, let's say, a hundred thousand tons of cement that you are claiming for and you have already settled for, on the basis of that and you put in a claim for a hundred thousand tons into the settlement fund, you get that pro rata share of it. That is a double recovery for those same purchases.

Mr. Spiegel: That is on the assumption that your Honor is allowing claims for purchases from non-settling defendants.

The Court: Well, I assume that, and that is what I indicated was at least my—

Mr. Spiegel: Yes, on that basis then California litigated further as against certain non-settling defendants and recovers some additional money that should be set off

against the share that California gets from the original settlement, but only attributable to the non-settling defendants.

Once you start attributing that to the share from the settling defendants, then you are penalizing California twice because—

The Court: No, just putting you in the same position as anybody else.

Mr. Spiegel: No. Well, I don't believe that is the case. Let's divide this hundred thousand tons into pieces. (p. 18) Suppose ten thousand of those tons are from California Portland, a settling defendant, and ninety thousand remained against Kaiser and California litigates the ninety thousand against Kaiser and received some settlement. Out of the original monies that are to be distributed from this settlement that is before the Court, if your Honor's approach to California was entitled to claim a hundred thousand tons, all hundred thousand, ten of those are attributable to California Portland. If the money California receives as a result of its settlement with Kaiser out of the ninety is then deducted against the entire amount, it seems to me you are overlapping two different kinds of claims because California was not permitted to proceed with the additional ten thousand tons that settled with Cal Portland against Kaiser.

Had we been able to proceed with those additional tons, theoretically the settlement against Kaiser would have reflected that.

The Court: But I would say you're riding two horses. You're riding the class action horse, a member of the class,

but I'm not a member of the class when it comes to the money that I have gotten otherwise.

Mr. Spiegel: But the other side of the coin is—

The Court: I'll take all I can get and have no risk at all.

(p. 19) Mr. Spiegel: I don't follow the "no risk at all," because it's the absent class members—

The Court: If you had lost your action, you would still be sharing in the class action class.

Mr. Spiegel: That—

The Court: Or if you went all by yourself and lost it, you would get zero.

Mr. Spiegel: Then that really argues, it seems to me, for something other than this pro rata approach because it seems to me that the people who purchased from the settling defendants and thereby gave up those claims in their future litigation against a non-settling defendant, were in fact at jeopardy. They gave up, using this ninety-ten example, California gave up ten and proceeded with ninety. Had they lost the ninety, that's gone. The non-settling—the absent class members took no risk. There is nothing they could have lost on their claims.

As Mr. Reed points out, Fabcom took no risk whatsoever as to its $2.8 million claim against Lehigh.

The Court: But they had forgotten about the brass ring.

Mr. Spiegel: Well, if they forgot about it—

The Court: They gave that up, the chance to get it.

Mr. Spiegel: They never gave that up. There is no (p. 20) dismissal.

The Court: They didn't go forward individually.

Mr. Spiegel: The statute has four years to run.

The Court: All right.

Mr. Spiegel: What your Honor is giving them is an opportunity to ride the coattails of the people who continue to litigate. Because once you deduct the settlements that happen subsequently to this settlement from the original settlement, or pay it back in, as your Honor will in effect, once you add it all out, it gives the absent class members a share of that money. They get a share in effect of all the settlements that took place subsequent to the decertification of the class and they took no risk. Not only did they take no risk, but they still have a claim that is viable for another four years which they could either litigate or settle on the threat of litigation.

And then, as Mr. Reed points out, you would have this continuing situation of requesting that these be paid back. It would seem to me there are some equities that would say that the people who actually purchased from the settling defendants should have a greater claim of the settlement fund because they did give up something more than these other people gave up. I don't think anyone can deny that. The people who purchased from the settling (p. 21) defendants gave up those transactions for the future. The people who purchased from non-settling defendants, all they gave up was the joint and several liability from the people that they agreed to settle with and from whom they purchased nothing. They still had

a full claim against everybody else. And to some extent, I think the Court ought to take into account that a system of permitting equal treatment of settling claims and non-settling defendant claims, in my view encourages people when they bring a lawsuit to name every conceivable plaintiff—defendant in the industry that they can find, which I think your Honor has expressed some concern about in this case during the course of the litigation.

The Court: They take the risk of Rule 11, Counsel.

Mr. Spiegel: That risk is always there.

The Court: I don't think lawyers would do that. But that may be my faith in lawyers.

Mr. Spiegel: I won't argue that.

The Court: It may not be shared with the public.

Mr. Spiegel: I raise the point that it seems to reward people for having sued 35 or 80 defendants and then signing off on those whom they may never have had any claim against, and then being able to further present those claims.

If I may turn to what for California is a more (p. 22) important question since the 11 million or 11.1 million tons of cement involved in the California and the California governmental class claims, if I am not mistaken, 98 percent of that is all based on the pendant state claim. So, to the extent those are disallowed, California and its entire governmental class is not really—doesn't really have any substantial interest in this settlement whatsoever. It amounts to something in the neighborhood of $50,000 as compared to something that might be in the order of $25,000,000 on the other hand. So what we are trying in

effect is doing—is dismissing California and the governmental class claims for approximately $25,000,000 without, in our view, any hearing, without any litigation, and the effect of it in our view—

The Court: Three billion in claims, I'm sure I am also dismissing another $25 million in claims somewhere along the line.

Mr. Spiegel: Seems to me that under the teachings of the Fifth Circuit in the Chicken Antitrust litigation that due process would require that if they—if a litigant has a legitimate claim at the time he is litigating, if he settles that claim, enters into a dismissal in good faith for that claim, that he is entitled to present his claim in the settlement fund that his dismissal created.

(p. 23) I can assure your Honor in the case of Cal Portland that had the State of California not agreed to dismiss the pendant state claim, there would not have been any settlement because the greatest exposure that Cal Portland had in the whole litigation was based on those claims.

And what your Honor, in effect, is saying is that you are going to permit a collateral attack after the settlement—after the contract amongst these plaintiffs has been entered into. And it is an issue of contract now because that is all that settlement is is a contract. A group of plaintiffs here entered into a mutual contract, each of them dismissing—agreeing to certain things, dismiss certain claims to the benefit of all by achieving a lump sum settlement, then afterwards—

The Court: Well, but as I understand Rule 23, no contract between the plaintiffs and/or defendants bind me to do equity.

Mr. Spiegel: Does not bind your Honor—

The Court: Or not do equity.

Mr. Spiegel: It doesn't bind the Court in terms of an equitable basis—as an equitable basis. Then I would submit on an equitable basis that the defendants state indirect claims—on an indirect basis—than are the so-called direct claims.

(p. 24) If I may explain that, I think there is some factual background information that has been clouded over from time to time during the course of this litigation having to do with so-called state indirect claims having to do with highway and other public works construction claims. It's been bandied about by lots of people without any real knowledge of the facts that these things are just some amorphous kinds of claims and there is no way anybody can know what kind of cement is used where and really all that happens is the cement company sells cement to Readimix companies then somewhere down the line when a highway is built and the contractor orders some Readimex from a Readimix company and there is no connection between that and the cement company.

Well, that isn't even remotely close to what the factual situation is. If I may point out, your Honor, for example, when the State of California advertises for bids to construct a highway, the cement companies themselves, the manufacturers, receive copies of that invitation. They do a calculation of how much cement is going to be needed

on that project to make the concrete that is going to be needed to pave a highway or build a bridge or to do both. The cement manufacturers themselves then submit quotations to various eligible contractors who might want to bid to the state. Those quotations, right on their (p. 25) face of it, identify the project for which those quotations are made. Those quotations are binding by California law and also by their own terms on the cement manufacturer in the sense that if he makes a quotation to a general contractor and the general contractor relies on that quotation and is awarded a project, the contractor can enforce that quotation as against the cement manufacturer. That is the California—

The Court: Didn't the Supreme Court in Illinois Brick have that very much in mind, exactly that argument?

The Court: I'm not sure that they did, no.

The Court: They didn't?

Mr. Spiegel: In fact, the brick situation is entirely different than the highway construction situation.

The Court: How it is different when somebody says I need a hundred thousand bricks, and you go to the Higgins Brick Co. or whoever it is and say, how much are you going to charge me for these bricks, because I've got to build a building for the State of Illinois, and the man says, I'm going to charge you a hundred thousand dollars. Do you mean that doesn't go into the bid, or the building?

Mr. Spiegel: Your Honor, I'm not now arguing cost plus equivalent or any exception to Illinois Brick.

The Court: No, but doesn't that price go into the (p. 26) building? Into the bid for the building?

Mr. Spiegel: The price?

The Court: Yes.

Mr. Spiegel: Yes.

The Court: How is it different then, and isn't that man in Illinois bound to deliver the bricgs for a hundred thousand dollars if that is the bid that he made to the contractor?

Mr. Spiegel: In Illinois I'm not sure whether it is or isn't.

The Court: Isn't that the common law?

Mr. Spiegel: In some states it's the law, in some state's it's not.

The Court: You mean there are some states where you can —

Mr. Spiegel: That's right.

The Court: —where you can break a contract?

Mr. Spiegel: Some states that's not considered a contract and it's not binding.

The Court: A bid is not binding?

Mr. Spiegel: That's right.

In any event, I wasn't going through this for the purpose of—

The Court: What state law provides that, Mr. Spiegel?

Mr. Spiegel: I don't have them before me, but I think (p. 27) there is a case involving highway construc-

tion that involved, if I'm not mistaken, the State of Minnesota or one other where in the footnotes that point is made because California wrote an amicus—

The Court: You have Mr. Catania here.

Is that the law in the State of Minnesota?

Mr. Catania: I'm not familiar, your Honor, with the case that Mr. Spiegel is referring to, but I wouldn't question that such a case may exist.

Mr. Spiegel: The point I'm making, your Honor, I don't think it's germane to this argument, but—

The Court: Well, that's what you're telling me. You're telling me because they are bound and the price goes into the contract that somehow or other the California claim is different than Illinois Brick.

Mr. Spiegel: No, I'm not trying to tell your Honor that. Your Honor jumped to that conclusion, and I wasn't even approaching that point. I way laying some background facts to make a different point.

The Court: Okay.

Mr. Spiegel: If I may continue, I'm not trying to argue that there is a clear pass on that. We all know about that and Illinois Brick deals with that in the way it deals with it.

The point I'm trying to make is the projects (p. 28) that cement is clearly identifiable specifically to the project.

The Court: The bricks weren't in Illinois Brick.

Mr. Spiegel: I think in a brick situation there's a difference because bricks are a minor item in construction and tend to be bought in warehouses.

The Court: You ever been in the east? You ever seen the buildings in the east?

Mr. Spiegel: I'm not going to argue the facts of Illinois Brick with your Honor.

The Court: Most of them are brick and that is a substantial part of the building. I don't think they could stand up without them.

Mr. Spiegel: What we are talking about—the Illinois Brick case arising where it was the State of Illinois, we are talking about—I don't think they were what one would traditionally describe as the small brick houses that your Honor may have in mind. And I think in the facts of Illinois Brick for a substantial—

The Court: No. I'm talking about brick buildings like penitentiaries and state houses and city halls.

Mr. Spiegel: Perhaps the bricks were identifiable as to the specific project in Illinois Brick. If your Honor accepts that then I don't have to explain to you that that's also the case with highways. Cement is (p. 29) identifiable specifically to the project because it has to be tested for that project by the state and the state keeps records from the test lab as to who the cement manufacturer is.

The Readimix or subcontractors or general contractors are required to keep the cement that is to be used on the state highway segregated from other cement. The

invoicing that goes between the manufacturer and the contractor or subcontractor specifically details the contract number and the project description for which the cement is to be used. So that—

The Court: My recollection of facts in Illinois Brick was that there was no problem in identifying from whom the bricks were purchased and at how much and how many.

Mr. Spiegel: Fine. Then we are going on the same track.

Mr. Spiegel: All right.

Mr. Spiegel: The point that I am trying to reach with all of this is that in this particular situation in this settlement, there may in fact be no conflict between a claim by a direct, so-called direct purchaser, that is a general contractor, for cement on a particular highway and the indirect claim under state law by the state for the same highway. And if there is no such conflict in a settlement as we are talking about here, then there (p. 30) is no equity that would say that the state's claim should be thrown out automatically.

And I would submit to your Honor in Minnesota where their claims were submitted a month earlier than in California, they have made such a check. And as it turns out that the general contractors who do the work for the State of Minnesota by and large didn't even make any claims in this settlement. And that doesn't even reach the second question of if—had that general contractor made a claim, was he claiming the cement for the same project that the state was?

So, there are two—two points there, that it's twice removed. And what I'm saying is that in the California

situation I would—if the 11 million tons that the state is claiming for, I would be very surprised if the—very much if any of that 11 million tons are being claimed by anybody else.

Now, we don't know that until the claims processing moves along sufficiently that those claims by the direct purchasers in California, if any, are identified and are further identified by looking at the invoices to see what projects those tons of cement were used for. And it would seem to me that that should be the first step before we throw out the California governmental class claims because again, talking in terms of equities, there's (p. 31) no doubt as to who pays for the highways in the state, it's paid for by the taxpayers.

And Illinois Brick made no pretense about giving a windfall to the direct purchasers. But if the direct purchaser isn't even claiming for the same cement as the state is and the indirect purchaser, it doesn't seem to me to be reasonable to give them a double windfall, that is, to let them collect money for projects for which they did supply cement and also to permit them to collect for the projects for which they did not supply any cement.

And to exclude the state from making—

The Court: Bring me past that again, Mr. Spiegel.

Mr. Spiegel: I said, there is no reason to permit them to have the windfall for collecting—in collecting money on projects for which they did supply cement and also permitting them in essence to get money for projects in which they did not supply cement.

The Court: How do they do that unless they make a claim?

Mr. Spiegel: Implicit in that is that by denying the state's claim, the state's claim for projects that are not otherwise claimed, were it to be allowed, it would dilute the settlement fund.

The Court: How is that a double recovery to the contractor if the contractor is not in here claiming some (p. 32) money here?

Mr. Spiegel: It isn't. Double recovery is in enhancing his position at the expense of somebody else who has an equal—

The Court: How does he do it unless he is here as a member of the class?

Mr. Spiegel: Because if he is here as a member of the class claiming—let's take this example. Let's take Guy Atkinson, a general contractor who does a substantial amount of California highway work. Now, I don't know whether Guy Atkinson made a claim or not. I expect they probably did not. But if they did, suppose they claimed five million tons of cement that they purchased and it turns out that of that five million tons that they claim only as an example one million was used on the California projects that the California Division of Highways, CalTrans, is claiming. So there would be four million tons of cement that legitimately, on an equitable basis, California should be allowed to claim because California dismissed that claim at a time when it had a viable claim and dismissed it in compromise so that everybody could get this fund, a fund that never would have existed if California did not dismiss those claims. And those four million tons are thrown out and thereby, by throwing

those out, Guy Atkinson's one million tons of cement achieve (p. 33) a higher value than they otherwise would have. In other words, that million tons of cement that they may have a legitimate claim for would have a lesser value if California's legitimate—

The Court: What you are saying is in the settlement I have to apply the pass-on theory.

Mr. Spiegel: No. That has nothing to do with pass-on at all.

The Court: You mean Guy Atkinson recovers for the million tons and so does the State of California?

Mr. Spiegel: No, no. Just the opposite.

The Court: Well, then, how can I do it except by pass-on?

Mr. Spiegel: Because we are talking about five million tons, your Honor, one million of which Guy F. Atkinson used and then are passed on to the state, and four million which nobody else is claiming, and the state as the end user is claiming.

The Court: Okay.

Mr. Spiegel: That is what we are talking about. It has no pass-on whatsoever in that situation. And I would argue as a minimum in that situation where no intermediary, where no general contractor, where no subcontractor is making a claim for the cement that was used on the state highways, that at least the state ought (p. 34) to be able to make that claim since the state paid for that and everybody—every commentator who has ever written anything about Illinois Brick and the Illinois

Brick Supreme Court itself admits that it's the end user who suffers the injury.

Now, the rule of Illinois Brick may have been an administrative rule for the courts to alleviate the burdens of having to do tracing, but where no tracing is involved in the situation which is the situation I am postulating to your Honor, it seems to me there is no equitable basis for throwing those claims out. And I don't see there has been any showing here by anybody upon which your Honor can make a determination that there is any conflicting claim or there is any need for pass-on.

Nobody here has made any argument and made any factual presentation—

The Court: But if there were, Mr. Spiegel, what you are indicating to me is I would have to apply pass-on.

Mr. Spiegel: No, I'm not.

The Court: Then there would be a double recovery; wouldn't there?

Mr. Spiegel: I have not reached that issue. I'm first trying to discuss with your Honor the issue whether there isn't a claim by an intermediary—

The Court: But I postulate to you, if there were (p. 35) a claim I would have to apply pass-on. Otherwise, it would be a double recovery; would there not?

Mr. Spiegel: No. Because the defendant is gone. There's no such thing here as double recovery or double liability. The defendants are gone.

The Court: Well, it is as against the other plaintiffs.

Mr. Spiegel: Not double. Nobody's getting double anything. What you are talking about—

The Court: But California claim collects double.

Mr. Spiegel: We don't get any double. Where do we get double?

The Court: The claim does.

Mr. Spiegel: How?

The Court: Because it applies to the same cement.

Mr. Spiegel: But the—

The Court: For the same million tons of cement you get twice as much as somebody else who has a direct purchase of a million tons.

Mr. Spiegel: How do we get twice as much?

The Court: Mr. Spiegel, I can't seem to explain it to you. You might want to read the record.

All right. Go ahead.

Mr. Spiegel: Let me continue, your Honor.

Look, the State of California for the million (p. 36) tons for which Guy F. Atkinson is also claiming, the state can only get once for it. If the allocation out of this fund is ten cents on the dollar, California, for each dollar or let say it's ten cents per ton, would get ten cents for that ton. Never gets twenty cents.

The Court: But the fund is chargeable for twenty cents under what I postulated.

Mr. Spiegel: Yes, your Honor is correct. The fund is—

The Court: Well, then, the other claimants get less on the same basis.

Mr. Spiegel: That's correct, if the fund was to pay twice on that purchase of cement.

The Court: That's where we started.

Mr. Spiegel: All right.

What I'm suggesting to your Honor is there is no rule of law that requires your Honor to give it equally to both. There are two possibilities that your Honor has at that juncture—in fact, there are three. Your—

The Court: The only rule of law that is now present is I can only give it to one and that is to the direct purchaser.

Mr. Spiegel: That I would respectfully submit that that rule of Illinois Brick only applies in a litigated situation with a defendant. It doesn't apply in a (p. 37) settlement posture as between various defendants. And of course, in re Chickens makes that point very clear, otherwise, they would have had—

The Court: You might want to take that to the Supreme Court and have it clarified because I don't know that they would make the distinction between a settlement consideration of pass-on and a litigation consideration of pass-on.

Mr. Spiegel: I'm only arguing to your Honor that the Fifth Circuit made that distinction in Chickens and that is the only circuit law on the subject right now.

Passing that particular point as to the Illinois Brick issue, your Honor does not have to be in a situation where

you have to award equally the same ton to both the state and the indirect—and the direct purchase of the contract. Your Honor can make an allegation as between them. Your Honor can allocate that equally, fifty-fifty or some other allocation and that would be based on some showing by the two parties as to what that allocation should be.

The fact that the parties might agree upon an allocation as was agreed in the Chicken case, and as was approved by the Fifth Circuit. That possibility is there. There's no reason at this juncture that that has to be thrown out. Those possibilities are still there, and it (p. 38) isn't clear that your Honor would have to award equally both the claimants so that the fund is diminished.

Your Honor can take one award for those tons and divide that award among two or even three parties if your Honor chose to do that, which would keep the rest of the claimants in the funds whole.

I would submit as long as this is an equitable determination that we have here, that that is a method and a methodology that ought to be considered.

Now, your Honor hasn't raised the issue, although it has been raised by some of the people opposing indirect claims, the issue of whether the California State law is constitutional. I don't believe that it is necessary in this proceeding to reach that issue. I believe that we are talking here about a settlement in *accord and satisfaction* and under those situations it's not appropriate for those people who are parties to that so-called contract to collaterally then attack the constitutional basis of somebody's claim that was given up in good faith.

The Court: Mr. Spiegel, don't I have to make that determination to determine the legality of the claim?

Mr. Spiegel: No, I don't believe your Honor does. I think your Honor can follow what the Fifth Circuit does. I point out that as long as those claims were good faith (p. 39) claims at the time that they were made, which I don't think anyone denies it. There was no—there was no or is no case law even today that says that those claims are unconstitutional.

At the time that they were compromised, they were compromised in good faith and the Fifth Circuit points out very clearly that that is sufficient to support a claim in a settlement fund. And it isn't proper to then attack that later on. So I would urge that your Honor does not have to reach that issue and that this should be decided squarely on the equitable basis as to what these claims are.

The Court: I don't have to decide the legality of the claim. If somebody comes in here and makes a claim I don't have to be concerned about whether or not that is a legal claim on the fund for equitable distribution?

Mr. Spiegel: Your Honor has to claim—decide whether something is a legal claim, but whether it's a legal claim in this situation is determined by the nature of what the settlement was, what people gave up. And I think that is clear from the Fifth Circuit analysis of this situation, that as long as it was not a sham claim at the time it was made in the litigation, as long as it was made in good faith and compromised in good faith, and that that compromise was necessary to achieve the fund (p. 40) that we're now talking about distributing.

Remember, had California not agreed to give up those pendant state law claims, there would be no settlement. There would be no $50 or $45 million here today to be distributed. Those defendants were not about to put any money on the table if the State of California and other states with very sizable state law indirect claims that at the time the settlement was reached were very viable in everybody's mind. None of these people knew what the outcome was going to be down the road on any of these issues.

The defendants didn't know that any more than the plaintiffs knew that nor any of these plaintiffs. The ones who are private and the ones who are direct purchasers didn't know that, either. They all sat there and urged the State of California to give those claims up so that this money could be put into the pot.

Now that the money is in the pot, they come along and want to say no, you are not entitled to have a claim, but at the time the money was put up, we insisted that you dismiss those claims and we dismissed those in good faith and there is correspondence between our office and the liason counsel for the plaintiffs in which we clearly state that it was our intention not to give up any claim for those things.

(p. 41) In terms of equity it would seem to me it's very unfair at this juncture then to just throw that out and say, well, too bad you don't get anything. You created the fund but you get nothing from it.

The fact of the matter is when one wanted to call the counsel for some of those companies, and especially Cal

Portland, I think you would find that the dismissal of the California pendant state claims may have been the most important consideration that Cal Portland had when they dismissed—when they wanted to settle this case and pay the money that they did pay.

Now, if your Honor does want to hear the argument on the constitutional issues, Mr. Garfinkel of our office who wrote the brief on that matter that we have submitted, is prepared today to argue that matter.

I would urge your Honor that we don't have to reach that matter. I leave it to your Honor as to whether you want to hear argument on that.

The Court: Not unless he wants to add something to the papers he gave me.

Mr. Spiegel: He has indicated that he does not.

With that, your Honor, if I may just quickly summarize the position that I am urging on your Honor as to the pendant state law indirect claims.

In the first instance, I would urge that the (p. 42) claims processing proceed to the point to where we can see whether there are any duplicate, so-called duplicated claims. That is to see whether any middle man, direct purchaser, is claiming the same tons of cement that are being claimed by a state for a public works construction project.

In the event there is no such duplication, then for those tons claimed by the state, they ought to get equal treatment in the settlement as anybody else is.

To the extent there is some duplication, then your Honor is faced with the question of how to allocate as be-

tween the state and the direct purchasers that share of the settlement. And I would urge that in the first instance, the parties ought to have an opportunity in that situation to try and work out such allocation system as they can agree on first and if they are unable to, then the various equities as between them should be presented to the Court for a determination.

The Court: I take it that would be a pass-on trial.

Mr. Spiegel: Could be. It doesn't have to be, but it could be.

The Court: What do you mean it doesn't have to be? What else could it be?

Mr. Spiegel: Well, it depends on how those facts as between them actually develop. I say it could be.

(p. 43) The Court: How could it be anything else?

Mr. Spiegel: In all likelihood it may well be. Depends on how that—how the documentation that they have shapes up. It may turn out that these are—

The Court: Give me a for instance in which it would not be a pass-on trial.

Mr. Spiegel: I can see somewhere where it would be an obvious cost plus equivalent, an obvious one where it won't require any—

The Court: You mean where I could make an easy determination that the entire amount was passed on.

Mr. Spiegel: Or wasn't passed on.

The Court: Or wasn't passed on. That's not a pass-on trial.

Mr. Spiegel: That is a pass-on trial. I had in mind when you used the word trial there would be a lengthy, cumbersome proceeding requiring witnesses and evidence.

The Court: You wouldn't need witnesses for that—

Mr. Spiegel: I have a feeling, your Honor—

The Court: —or evidence? How would you determine it?

Mr. Spiegel: I said a lengthy proceeding. I have a feeling, your Honor, that—

The Court: Or are lengthy proceedings the only ones you classify as trials?

(p. 44) Mr. Spiegel: No. I'm not trying to debate the meaning of words, I'm talking about Illinois Brick argument about—

The Court: Let's talk about the common definition of things, then, Mr. Spiegel. A trial is where witnesses and evidence are considered.

Mr. Spiegel: Your Honor would then have to have a trial as between the competing claimants for that piece of the funds that would involve some form of pass-on.

The Court: All right.

Mr. Catania: May it please the Court, Tom Catania on behalf of the State of Minnesota.

I just want to give your Honor a couple of facts so that you have the whole picture.

What the State of Minnesota has done is on our core testing reports which indicate both the manufacturer who supplied the cement and the contractor who put it in

for us, we have examined the claims submitted by—through claims processing the individual claimants. And wherever a claimant, a contractor submitted a claim who also did work on state projects, whether or not that person may have submitted a claim based on the work for the State of Minnesota or not, we removed that particular claim from our claim form. So, we have only submitted claims for projects where we know that the contractor who did the (p. 45) installation has not submitted a claim at all.

So, for our purposes, we don't think there would be a pass-on issue raised.

The second—

The Court: Well, under Illinois Brick, who has the claim?

Mr. Catania: We will under our state law.

The Court: No, under Illinois Brick who has the claim?

Mr. Catania: Well, your Honor, under Illinois Brick a direct purchaser is a person entitled to make the claim.

The Court: Okay.

Under the Minnesota law, I guess it does not make any difference whether or not the contractor makes the claim; does it?

Mr. Catania: No. There is a second sentence in the Minnesota law that says in any subsequent proceeding the Court shall make every effort to avoid duplicate recovery.

The Court: Well, so I say it makes a difference if the contractor makes a claim. There has to be a so-called pass-on trial; does there not?

Mr. Catania: We thought it might make some difference, your Honor, and that is why we didn't submit claims for any projects where a Minnesota—the contractor (p. 46) did submit a claim.

The Court: All right.

Mr. Catania: We took those out.

The only other point I would make, your Honor, is I would echo Mr. Spiegel's comment about the settlement fund being generated in large part or significant part by the states' willingness to compromise the indirect claims.

Mr. Cooper could also confirm that in the case of the Northwestern settlement—they sell a substantial amount of cement into the State of Minnesota—they were particularly concerned it would not enter into the settlement until they received assurances that our state claim would be compromised.

The Court: All right.

Mr. Catania: Thank you.

Mr. Divelbiss: Carl Divelbiss representing Smith and Green Corporation.

Your Honor will recall I believe that in the notice in relation to direct purchases, two exceptions were noted, Smith and Green Corporation, and Arizona Cement Block Co., both of which had claims based upon a refusal to deal, whereby the defendant cement manufacturers refused to sell direct to these two plaintiffs with the result that for Smith and Green at least, a bulk of their (p. 47) purchases they made as a result of having to go out in the retail market and purchase cement in bags.

Our purchases, as I recall, totaled somewhere in the area of $786,000, out of which about $600,000 was based upon purchases made from various retail dealers throughout the State of Arizona, some 10 or 12 dealers.

Arizona Cement Block is in the same position.

Now, I would like to ask, then, for clarification as to whether in your Honor's indication of how you viewed this case as whether the purchases of those two plaintiffs would be included in the recognizable claims.

The Court: I had not included those in what I had said, Mr. Divelbiss, but I think that they should not be included.

Mr. Furth: Does your Honor wish me to inquire if any of the counsel who are not regular counsel here but have filed a request to appear if they wish to argue, your Honor?

The Court: Anybody else want to be heard?

All right.

Mr. Leonard: Dave Leonard. I represent the Arizona Readimix companies. We are the direct purchasers of cement in Arizona.

May I ask the Court, do I understand that the Court is not going to permit our customers, the indirect (p. 48) purchasers to make any claims from the fund?

The Court: That's right.

Mr. Leonard: On many occasions the State of Arizona and counsel for the former class have raised this specter of a vertical conspiracy in which my clients were supposedly involved and they also now raise some question as to whether we were ever members of the class or whether the statute of limitations has run.

Since we don't get an opportunity to have any input into the form that the orders take, would it be proper for me to ask the Court if it would be possible in this distribution order to lay to rest any further claim that we're going to have to get involved in a trial of vertical conspiracy claims, Illinois Brick exceptions and statute of limitations so that all by direct purchasers have to do is prove in fact they made the purchases that they said they have made.

The Court: Statute of limitations has run as to you in all claims, I think.

Mr. Leonard: Well, I wonder if I might address that, your Honor.

The Court: All right.

Mr. Leonard: The motion that my clients made, motion for clarification which was made back in 1981, pointed out that it was our understanding that we were (p. 49) not excluded from the class, that we were part of that class. And we pointed out to the Court that—

The Court: But that doesn't save the statute of limitations for a claim against you.

Mr. Leonard: I'm talking about our claims against the cement companies, that we were included in the national cement class.

The Court: All right.

Mr. Leonard: The indirect purchasers are now taking the position in their papers that somehow we are not included in the class of direct purchaser, the national cement class for settlement purposes. And they say that is because we were not added until 1981.

We have pointed out in our papers before this Court that by stipulation of the plaintiffs and the defendants as a result of our motion for clarification, the Court clarified the definition to indicate that we also were members of the class.

And basically, what I am asking the Court is, if the Court could focus on that and not subject us again to further attacks during the claim auditing process, that we somehow are not members of the class.

We have always been members of this class of purchasers from the cement defendants. That was clarified back in 1981. And we would ask the Court if it would be (p. 50) possible to dispose of that now again in the order so we don't have to face that or vertical conspiracy claims again.

The Court: I have your position. All right.

Mr. Leonard: Thank you very much.

Mr. Reed: If I may, your Honor, Kenneth Reed again on behalf of the State of Arizona.

I would like to reply first of all to Mr. Leonard's claims that the Arizona Readimix companies were since time immemorial members of the national cement class. The Court has before it as part of the memoranda that have been filed in this the quotation of the original class

definition by Judge Miecke in Pretrial Order No. 60 saying the class consists of people who bought cement except defendants. Not except Readimix defendants, not except cement defendants, not except every other defendant, not except defendants whose names begin in R or Z—except defendants.

Mr. Leonard, five years after this litigation began, brought a motion to change that. And in Pretrial Order No. 73, Judge Miecke did change it. And instead of excluding defendants, he excluded in Pretrial Order 73 defendants in the cement counts of this litigation, narrowing the scope of exclusions and adding for the first time Arizona Readimix companies to the class definition.

(p. 51) Now Mr. Leonard will stand up before this Court and has stood up before this Court and said that Arizona Readimix companies were always members of the national cement class.

A lot of things could be done. Judge Miecke's orders could be disagreed with. Judge Miecke's reasoning could be disagreed with and vacated. But what Judge Miecke did can be denied.

Whether Mr. Leonard agreed with it or not, whether Mr. Leonard asks this Court to vacate Judge Miecke's rulings or not, it is impossible to say that Judge Miecke did not make these rulings.

Over and again in the briefing papers, and I cite you—you know, we can provide a list of the numbers of times when it was cited—but just simply for an example, in our brief, in plaintiffs' brief served on Mr. Leonard on the class certification, class definition issue in November of

1979 on Page 11, quote: "In fact, the Arizona Readimix companies as defendants in this case are expressly excluded from the class."

Over and over again it was clear, and stated over and over again, that until Pretrial Order 73, entered in 1981, the Arizona Readimix companies were not part of the class.

As a result of that, what is the consequence? (p. 52) Number one, the statute of limitations had run on their claims; number two, they were not parties to any of the settlements with Amcor, Southwestern, Cal Portland, River and so on, that were entered prior to their being added to the class. Number one, they were not recipients of any of the money from the earlier settlement; number two, when they were finally added to the class, the statute of limitations on their claim had already run.

The Court: All right.

Mr. Reed: The final point, your Honor, Mr. Leonard solicited from this Court a comment regarding whether the Arizona Readimix purchasers would be allowed to submit claims. I did not understand such an issue to be on for hearing today. The class notice—both two class notices, sent out under Judge Miecke's direction and the one class notice sent out under this Court's direction, both indicated that people who claimed under valid Illinois Brick exceptions would be entitled to share in the settlement fund, and there was no written objection made to the proposition that claimants under valid Illinois Brick exceptions should be entitled to share in the settlement fund.

I—again, I do not know what it was that Mr. Leonard referred to when he solicited that comment from the Court,

but I do not understand it to be any preclusion (p. 53) against asserting the claims that Judge Miecke on two class notices and this Court on one class notice indicated would be permitted and to which no written objections would be made.

The Court: All right.

Mr. Reed: Could I ask if I correctly understood the Court's comments or what the Court meant by those comments?

The Court: I'm not including the Arizona Readimix companies as part of the claimants.

Mr. Reed: Thank you, your Honor.

The Court: That's what I have said.

All right, Mr. Leonard.

Mr. Leonard: May I have an opportunity to proceed briefly to reply, your Honor?

The Court: Sure.

Mr. Reed: I'm sorry, did the Court say you were not including my clients as part of the plaintiffs' claims?

The Court: Yes.

Mr. Leonard: I find—if I might briefly respond to what Mr. Reed has said, I would ask the Court to read Pretrial Order 73 and all the motions and papers that preceded it.

I do not understand Mr. Reed's argument. The order says Columbia Building Materials having filed a motion

to clarify or amend the class and the parties having (p. 54) reached the agreement and pursuant to stipulation, good cause appearing, it is ordered that Allied, Allied Chandler, Columbia, Johnson and Stewart, Mesa, Phoenix, all of my clients, Phoenix Tanner, Tri-City, Union Rock, shall not be deemed or considered to be excluded from the national class.

That was Judge Miecke's order. That was as a result of our request to clarify or amend the class definition.

The Court clarified the definition to say we were not excluded. The original exclusion said except defendants, and other entities that produce cement. And we are not, none of us are defendants or other entities that produce cement.

And the Court clearly said that we were not excluded from the class. The arguments that were made, and I have extra copies of many of the peladings involved in the clarification, but I know that they are also filed in the court, the arguments that were made included these: The defendants said, we believe the Arizona Readimix companies are included. We want them to be included. We do not want to be sued separately by them. We feel that they are now, always have been, included and if they are not, they should be.

The plaintiffs said to Judge Miecke, please don't (p. 55) clarify or amend. If you do, they will share in the settlements we have already negotiated and are now before you, Judge Miecke, to confirm and to approve.

And Judge Miecke granted our motion. And by stipulation clarified, leaving us in the class.

So the position that we took was adopted by the Court in that order. I don't understand the position that somehow our claims are barred by the statute of limitations when we asked in 1981 if we were not right and we were told that we were right and that we are named and specifically said not to have been excluded from that.

The Court: All right. I have your position, I think, Mr. Leonard.

Mr. Leonard: On the other point I wanted to respond to Mr. Reed was this: The reason I raise this now is that in the papers for this hearing on the distribution plan, the State of Arizona raises the issue of vertical conspiracy and offers evidence to the Court that there is a vertical conspiracy. We responded. Our papers make these arguments basically that I'm making now, that we have never been parties, we have never had an opportunity to discovery. This issue has never been before this Court as to vertical conspiracy. The Court has already ruled that that issue is not before the Court, that that Illinois Brick exception is not before the Court. Yet with respect (p. 56) to this hearing, the State of Arizona raises it again to say that my clients are guilty of a vertical conspiracy and under the appropriate exceptions to Illinois Brick they should recover and we should not.

We were under the impression that we were members of the class and that the Court had ruled already in our favor on that issue that the vertical conspiracy was not before this Court. And I guess I am just confused that they are now saying that although the Pretrial Order 73 says we are not excluded and were not, and although the Court has said vertical conspiracy is not at issue, they

seem to believe that this is still an issue for the Court to somehow try or resolve with respect to the claims.

And I would just ask that the Court take a look again at the clarification memoranda and Pretrial Order 73 and the papers that we filed in response to Mr. Reed's arguments and ask once again to clarify that in this order.

The Court: All right.

Mr. Kane: Your Honor, Christopher Kane representing Colorado Concrete.

Your Honor, we agree with all of the Court's preliminary views, that is, the four views that you gave at the outset of this hearing.

I would request clarification, though, of this—of Mr. Leonard's argument and Mr. Reed's argument, (p. 57) because I thought the Court had said initially that the indirect Arizona purchasers, that is the purchasers from the Arizona Readimix companies, would not be permitted to claim—

The Court: That's right.

Mr. Kane: Then I thought you said just—

The Court: No indirect purchasers.

Mr. Kane: But then Mr. Leonard's clients are the direct purchasers—

The Court: All right.

Mr. Kane: And so, I think it's—I would request clarification. Do they have the right to claim?

The Court: I have that in mind and I will submit that matter.

Mr. Kane: Then, your Honor, unless your Honor is inclined to change any of your tentative view, I have nothing further to say.

The Court: No.

Mr. Kane: Thank you.

Mr. Divelbiss: Could I just be heard briefly?

The Court: Certainly.

Mr. Divelbiss: If the Court please, if I may go just one step further as to the notice which went out.

I would like to quote to the Court the specific language which was contained in the notice. And I quote: (p. 58) "Two plaintiffs, Smith & Green Corp. and Arizona Slump Block will request the Court to approve their claim for purchases of cement from entities other than cement manufacturers and their affiliates and to pay those claims as though cement had been purchased from Phoenix Cement Co. and Arizona Portland Cement Co. These plants alleged in their complaints that certain defendants have refused to deal with them, forced them to buy cement at higher prices on the open market, which claims were settled as part of the settlement agreement which created the settlement fund."

Now, that provision in the notice was reached by agreement and to my knowledge, none of the plaintiffs have filed objections to those claims being paid as specified in the notice other than the State of California, and I believe I saw one letter written by somebody down in Texas direct to your Honor that raised some objection.

Other than that, I don't think there will be any objection on the part of any of the plaintiffs.

The Court: Yes. Mr. Varner on behalf of Hertel, also.

Mr. Divelbiss: Is that the one in Texas that I'm thinking about? I thought it was in a letter that I saw the other day.

The Court: He is from Washington.

(p. 59) Mr. Divelbiss: You might have some something I didn't get because I have not been receiving everything the Court has.

The Court: The plaintiff is Robert Hertel.

Mr. Cooper: My records indicated that and I believe everything was served on all counsel by my office. My records indicate that the objection from Gulf Oil and the objection from ARC America Corporation and various subsidiaries were the two that addressed the Smith & Green question.

Mr. Divelbiss: Gulf Oil is the one I'm thinking of because that was written someplace in Texas.

But other than that, in point of time, in relation to the notice, I think that clause was put in there specifically to take care of these two claimants. I know of no other claimants whose claims are based upon refusal to leave.

The Court: All right.

Mr. Divelbiss: Thank you.

Mr. Varner: Good morning, your Honor, Christopher Varner from Washington for Robert Hertel.

I'm from Washington where there is a lot of marble but there's also a lot of brick back there.

The client is from Michigan and we agree with all of the views that you have expressed, your Honor, so (p. 60) we would submit our arguments on the papers.

The Court: All right.

Is Hertel a Texas—

Mr. Varner: No. He's a—it's a Michigan company.

The Court: Your supplemental went to the question of Arizona Slump and Smith & Green, I believe; didn't it?

Mr. Varner: I think it's mentioned in one of the papers, your Honor.

The Court: Yes. Supplemental. All right.

Any others?

Mr. Cooper: Your Honor, since I am the one that's going to be responsible for preparing the order, I thought perhaps I should go through now and make sure I do understand what the status is of each of the issues.

First of all, with regard to the question of waiting between settling and non-settling defendants, there will be no weighting.

The Court: No weighting. All pro rata.

Mr. Cooper: All pro rata.

Second, with record to the question of indirect purchases—

The Court: Well, no indirect purchases to be allowed.

Mr. Cooper: —will not be allowed and that is both indirect purchases by California, Minnesota and Alabama, as well as indirect purchases of Arizona claimants.

(p. 61) The Court: Right.

Mr. Cooper: With regard to the Arizona Readimix—

The Court: Submit that matter and I will give you a separate order.

Mr. Cooper: That is submitted.

The Court: Civil penalties, no.

Mr. Cooper: Civil penalties, no.

With regard to Slump Block and Smith & Green—

The Court: Let me submit that and I will give you all those at one time.

Mr. Cooper: That is submitted.

With regard to plaintiffs' recoveries from non-settling defendants on an individual basis, or with regard to California, I assume on a class-wide basis those recoveries will be compared to the recovery here, if there is a—

The Court: —charge against total recoveries, so everybody shares equally.

Mr. Cooper: Now, your Honor, one of the confusions that I have was, there was discussion that—I'm not certain how it was phrased, but discussion with regard to whether or not a company—a claimant who purchased from Lehigh, for example, a non-settling defendant, would have to waive their claim again Lehigh in order to participate here on those purchases.

(p. 62) The Court: Either waive or we will—one other aspect of it the way it could be done is we will escrow those claims until the statute of limitations has run on their individual claims.

Mr. Cooper: Part of my concern is what Mr. Reed said with regard to the possibilities of delay, and one—

The Court: It won't delay the distribution of the rest of the money. Just escrow those funds.

Mr. Cooper: Your Honor, let me try to express more clearly what my concern was.

The Court: Sure.

Mr. Cooper: In the auditing process, if we are not distinguishing, as we would not have to, based on your Honor's ruling, that there is no weighting, we would not have to maintain records and would not in the normal course maintain records in the amount of purchases from individual defendants in order to determine whether it was a settling or non-settling defendant.

If we are going to have to be able to escrow, for example, funds based on purchases from a non-settling defendant, then we would have to, in the auditing process, make that inquiry of who you bought from in order to know which funds were going to be escrowed.

So, if it's a waiver situation, we could treat it by communicating with the claimants. There would be (p. 63) approximately 3500 people we would have to write a letter to and advise them of the ruling and perhaps send them a copy of your Honor's order so that they could be bound by the waiver which would avoid the necessity of having to distinguish in the auditing process between who

you purchased from, because we would send that letter out and obtain waivers immediately and then only have to deal with the escrow problem for those people who are unwilling—

The Court: I have no problem with the waivers. If they want to waive, they can get their money now and get that taken care of.

Mr. Cooper: So your Honor, what I would intend to do, then, is include in the order a provision which says all claimants who have been notified of this ruling, and—

The Court: For those people who have approached in their papers that they cannot proceed in any event against the non-settling defendants.

Mr. Cooper: For their —

The Court: — for their individual claims.

Mr. Cooper: For purchases from non-settling defendants.

The Court: On that basis, I think they should either say they're going to waive or go after them and do the same thing that California and everybody else has to do.

Mr. Cooper: So the order, your Honor, will say that (p. 64) if they are going to attempt to claim on those purchases from this fund, that they must waive the claim and it will probably set it up so that silence is construed as waiver rather than the other way around because the chance of getting responses from 3500 people are very small.

The Court: If they have claims, you have them. If they don't have claims, then on this fund there's no problem, Mr. Cooper. But I question down the road that silence as a waiver will be viewed very kindly by at least the Ninth Circuit.

Mr. Cooper: I'm aware of that problem, your Honor. The problem I'm trying to wrestle with is—

The Court: No, I understand that, but you have the claims and so those people will be in and they have to make their determination. Those who make no claims, of course, are not taking anything from the fund, so they have nothing to refund in effect.

Mr. Varner: Your Honor, could I suggest a possible alternative?

The Court: Yes.

Mr. Varner: That is instead of a waiver or escrowing you could issue an order that any amounts received under the claims process would be an offset against any future recovery in other litigations.

The Court: No, because that affects the other (p. 65) plaintiffs. If it comes back into the pot, the other plaintiffs will get more.

Mr. Furth: May I make a suggestion, your Honor?

The Court: Yes.

Mr. Furth: I think we ought to ask them to respond affirmatively that they have waived and see how well we do with that. And to quote his Honor, Judge Sirply, you know, to the diligent go the rewards. If we find out that we have some recalcitrants, we can then deal with them at a future hearing.

The Court: Yes.

Mr. Furth: We ought to give them at least one shot on an important notice, include the order, say, you have to respond waiving, otherwise your funds will be escrowed pending the statute of limitations.

The Court: See, you only have those people who have made claims.

Mr. Cooper: Yes, your Honor. The problem we are trying to deal with, though, is to eliminate the need to search each claim to distinguish between who they—

The Court: I understand that.

Mr. Cooper: We'll start it out by sending out a copy of the notice to the claimants advising them of the ruling and telling them they should respond within 30 days or 15 days. And then—and perhaps advising them that failure (p. 66) to respond may—or some such that is acceptable to your Honor. Some language which is not a ruling and not a waiver, but at least puts them on notice they should respond to try to induce affirmative responses, and then see where we get to.

The Court: I think Mr. Furth's idea might be the thing. And then they may be excluded from the claims and then we have no problem. Not a waiver, but just exclude them from the fund and I think we can do that.

Mr. Cooper: To identify these people, your Honor, we have to go in—

The Court: I recognize that, and that is a problem.

Mr. Cooper: We'll deal with it, though, then as that—once that happens, your Honor.

The other two things that I wanted to mention, your Honor, is so there is no question by Mr. Leonard or anyone as to the order being submitted, we will circulate the draft of this order to all, not only plaintiffs' counsel, but appearing counsel for class members who filed objections before submitting it to your Honor to try to determine if we can reach complete agreement on the language.

So we will take that step so Mr. Leonard can rest assured he will get an opportunity.

The last question is, your Honor, was whether (p. 67) your Honor felt it might be appropriate to make this a 54(b) judgment rather than to go through the complete auditing process then potentially have someone take an appeal two years from now or a year from now.

The Court: I think that is a wise idea, also.

Mr. Cooper: And your Honor, I realize that it is difficult to order people to seek that the Ninth Circuit expedite anything, but I would be pleased to solicit—

The Court: If we can do it, let's do it.

Mr. Cooper: My concern, your Honor, once again, is with the processes in the Ninth Circuit we would go through the complete auditing process then have to redo it if the Ninth Circuit disagreed with your Honor, so I will include something at least suggesting that people try to do something—to seek expedition from the Ninth Circuit.

Thank you, your Honor.

The Court: All right.

Mr. Furth: Your Honor, I think that covers our agenda and we appreciate your Honor coming over here. We know what a busy schedule you have.

The Court: Well, on behalf of the plaintiffs, you probably should apologize to defendants' counsel who still have children in college.

Mr. Furth: Well, your Honor, I think there is a—your Honor may not have heard, but they called me up last (p. 68) week and made me—they had a dinner. I don't know whether it was a victory dinner or what, but they made me do a tape, your Honor, to provide the entertainment for their dinner party.

The Court: All right.

Mr. Furth: Thank you.

The Court: Mr. von Ammon.

Mr. von Ammon: First, I would like to say if I may, your Honor, that Mr. Furth was invited to that dinner, except that we had a different diet for him that involved some humble pie.

We have a housekeeping matter which I believe is on the agenda for today, and I believe that the original of the proposed order was submitted to Miss Duffy and may be before you, under the Pretrial Order 3, Paragraph 9 there is a requirement, indeed an injunction against all parties from destroying or permitting the destruction of any document relevant to any claim or issue raised in any of these cases which was in existence as of September 28, 1976.

Pursuant to the discovery process, the documents which were submitted to plaintiffs were reproduced on a

selective basis with the understanding that a copy of each document copied by plaintiffs would be furnished to defendants to put into defendants' document depository.

(p. 69) The proposed order contemplates that those documents will be retained by defendants in depository for a period of 24 months and that with the exception of that retention the injunction in Paragraph 9 of the Pretrial Order 3 will be dissolved or rescinded so that the defendants will be at liberty to dispose of any documents other than those described.

Now, we did not serve copies of this on anyone because there were no plaintiffs' counsel of record in the proceeding. I believe Mr. Maledon shared this with Mr. Cooper this morning and I was not privy to the conversation, but I understood that Mr. Cooper seemed to think it was a reasonable proposition.

Mr. Reed: May it please the Court, Kenneth Reed on behalf of the State of Arizona.

As Mr. von Ammon, of course, is aware, the State of Arizona does have a pending appeal in this matter and if I can persuade the Ninth Circuit to send it back down, obviously I would have an interest in the documents.

We do not have any great difficulty with the basic notions advanced by Mr. von Ammon that the documents, some 18 years old, need no longer, as a general matter, be retained and that by retaining things—only retaining things that are present in each side's document depository, probably suffice for future purposes.

(p. 70) There are a few minor details, however, with Mr. von Ammon's proposal that are apparent to me, and

some additional ones that have just been brought to my attention. Unfortunately, since neither I nor other plaintiffs' counsel were served with this, we are unable to either attempt to resolve our differences with Mr. von Ammon or reduce our objection to writing.

What I might suggest, I would request of the Court, is that we have the other pretrial conference set in Phoenix, Arizona for December 7, 1984. I would request that this particular matter be continued until then and that in the interim Mr. von Ammon and I and any other counsel who may be interested, try to resolve what I believe are minor semantic differences. To the extent we cannot resolve those differences, that we submit our opposing position papers which the Court will consider on December 7.

The Court: I don't have my calendar here, but my recollection is we do have some kind of investiture service in Los Angeles on the 7th, so if it's going to be on the 7th, it will be in Los Angeles.

Mr. von Ammon: I think it's in Los Angeles on the question of fee applications, is my—

The Court: Also. And Mr. von Ammon, you can amend the order to say that those documents which Mr. Reed wanted you to keep will be delivered to him and he can store them (p. 71) wherever he wants to store them. Any other documents, that they will be recycled.

Mr. von Ammon: All right. And in that respect, perhaps we can save one tree in the forest.

The Court: I hope more than one, I'm sure.

Mr. von Ammon: We will submit an amended order which will provide that Mr. Reed will have, let's say, 15 days to designate any additional papers which are in our possession which we would like to have and with the understanding that they will be stored by him at no expense to the defendants.

The Court: That's correct, delivered to him.

Mr. von Ammon: Thank you.

The Court: Okay.

Mr. Reed: Your Honor, if there is a conflict on December 7th, I think the conflict may be of great magnitude than distance between court and counsel. The notice that was mailed to some 210,000 class members told them to show up here in Phoenix at 10:00 on December 7. I'm certain all counsel will be more than happy to accommodate the Court's convenience.

The Court: I don't have my calendar and I don't have any recollection, but if the notice has gone out for Phoenix, it's going to be here and I will be here.

Mr. Cooper: That is what it says. I do have a copy.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

IN RE CEMENT AND CONCRETE ANTITRUST LITIGATION	)	MDL DOCKET NO. 296 PHX-MLR
THIS DOCUMENT RELATES TO:	)	JUDGMENT
ALL ACTIONS	)	

(Filed February 4, 1985)

This action came on for hearing before the Court, the Honorable Manuel L. Real, Chief, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered.

IT IS ORDERED AND ADJUDGED that distribution of the Net Settlement Fund will be by pro-rata allocation of all approved claims for allowable purchases from settling and non-settling cement manufacturers, with no weighting of claims based upon whether a purchase was made from a settling or non-settling cement manufacturer.

Claims will not be allowed for indirect purchases of cement or cement-containing products unless such claims fall within one of the presently recognized exceptions to the rule enunciated by the Supreme Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The indirect purchaser claims advanced by the State of Alabama, California and Minnesota pursuant to their respective state statutes which purport to authorize recovery for indirect purchases are disallowed. Such statutes are clear attempts to frustrate the purposes and objectives of Con-

gress, as interpreted by the Supreme Court in Illinois Brick, and, accordingly, are preempted by federal law.

Claims will not be allowed for any State civil penalties.

No claim based on purchases from a non-settling cement manufacturer will be paid from the settlement fund unless the claimant agrees to waive any right he may have to proceed against any non-settling cement manufacturer for a recovery based on such purchases. Accordingly, each claimant whose previously-filed claim includes purchases from any non-settling cement manufacturer shall be given the option of: (a) withdrawing that portion of his previously-filed claim which seeks recovery for purchases from any non-settling cement manufacturer; or (b) affirmatively waiving and relinquishing any causes of action which were the subject matter of this litigation against said non-settling cement manufacturer(s). Any claimant whose claim includes purchases from any non-settling cement manufacturer who does not (1) withdraw that portion of his claim which seeks recovery for purchases from a non-settling cement manufacturer; or (2) affirmative waive all causes of action which were the subject of this litigation against said non-settling cement manufacturer(s) shall have his pro-rata allocation of the Net Settlement Fund placed into an escrow account until expiration of the statute of limitations period on the causes of action which were the subject of this litigation against non-settling cement manufacturers, following which time the pro-rata allocation will be distributed to that claimant if he is not a plaintiff in any action for recovery from any non-settling cement manufacturer based upon the causes of action which were the subject of this litigation. If a

claimant is a plaintiff in any such action for recovery from any non-settling cement manufacturer, that claimant's pro-rata allocation will be held in escrow until the conclusion of that litigation, at which time it will be treated as proved in Paragraph below.

Any claimant who has received or may receive any amount by settlement or compromise of any claims or causes of action which were the subject of this litigation from any non-settling cement manufacturer shall have the amount so received deducted from that claimant's allocated share of the Net Settlement Fund prior to distribution unless said claimant withdraws any claim against the Settlement Fund based on purchases from such non-settling cement manufacturer.

IT IS FURTHER ORDERED AND ADJUDGED that the Motion of plaintiff Arizona Slump Block, Inc. "To (1) Set Aside Order Dated November 21, 1984 or (2) In the Alternative, to Amend Said Order" is granted to the extent that it clarifies the November 21, 1984 Order to make clear that claims based on direct purchases of cement or cement-containing products will be allowed, subject to verification by the normal claims processing procedure. Claims based upon a refusal to deal will not be allowed.

IT IS FURTHER ORDERED AND ADJUDGED that the Motion of plaintiff Smith & Green Corp. "To (1) Set Aside Order Dated November 21, 1984 or (2) In the Alternative to Amend Said Order" is granted to the extent that it clarifies the November 21, 1984 Order to make clear that claims based on direct purchases of cement or cement-containing products will be allowed, subject to verification by the normal claims processing procedure. Claims based upon a refusal to deal will not be allowed.

IT IS FURTHER ORDERED AND ADJUDGED that portion of the Court's November 23, 1984 Order providing that the Arizona Ready-Mix Companies are included in the plaintiff class previously certified herein and are entitled to share in the distribution of the Net Settlement Fund is hereby affirmed.

IT IS FURTHER ORDERED AND ADJUDGED that the Motion of Plaintiff State of Arizona "For Stay of Notice to Claimants Pending Appeal" is denied.

IT IS FURTHER ORDERED AND ADJUDGED that on or before February 4, 1985. Notice of the Approved plan of distribution in the form attached as Exhibit A to Pretrial Order #122 shall be disseminated by First Class United States Mail to each claimant in this litigation.

IT IS FINALLY ORDERED AND ADJUDGED that this judgment be entered pursuant to Rule 54(b), Federal Rules of Civil Procedure.

Dated at Phoenix, Arizona, this 4th day of February, 1985.

W. J. FURSTENAU, CLERK

By: /s/ illegible

Deputy Clerk

APPELLANT'S BRIEF

No. 87-1862

NOV 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

STATE OF CALIFORNIA, *et al.*,

Appellants,

vs.

ARC AMERICA CORPORATION, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

BRIEF OF APPELLANT STATES

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QUESTIONS PRESENTED

1. Whether the existence of a federal remedy under Section 4 of the Clayton Act, 15 U.S.C. § 15(a), for direct purchasers precludes sovereign states from authorizing a remedy for downstream victims who are injured by anticompetitive conduct which is condemned by federal and state law?

2. Whether the remedial provisions of the antitrust laws of sovereign states which provide the *only* remedy for many victims of price-fixing can be ousted under the Supremacy clause where the text and legislative history of the federal antitrust laws affirmatively support the validity of such remedies?

3. Whether remedial provisions of state antitrust law can be preempted when the Congress has repeatedly demonstrated its support for vigorous enforcement of state antitrust law?

PARTIES TO THE PROCEEDING BELOW

The following were plaintiffs/appellants to the proceeding in the United States Court of Appeals for the Ninth Circuit:

State of Alabama
State of Arizona
State of California
State of Minnesota

The following were plaintiffs/appellees in the lower court proceeding:

City of Austin, Texas
Beauty Built Homes, Inc.
Edward W. Bergguist as Trustee in Bankruptcy for Western Concrete Products, Inc.
Blankenship Builders, Inc.
Buck Brown Contracting Co., Inc.
Bill Carson dba Bill Carson Construction and Bill Carson Construction Company, Inc.
State of Colorado
Colorado Concrete Mfg. Co.
Estes Corporation
Ora B. Hopper & Son, Inc., Construction & Development
State of Florida
Hechinger Company
Ellis F. Hendricks
State of Kansas
Katterjohn Concrete Products Co. of Owensboro, Ky., Inc.
Walter K. Laursen dba Thriftway Lumber and Thriftway Lumber Co.
The Leavell Company
The Lusk Corporation
State of Louisiana
State of Missouri

State of Montana
State of Nebraska
State of New Mexico
Northern Materials Inc.
State of Oregon
Vincent S. Perry
Picou's Builders Supply, Inc.
Harry M. Rubenstein, Rubenstein Development Co. and Central Palm Plaza
Sabino Vista Realty & Developments, Inc.
Sea Foamed of San Diego
The Sta-Dri Company
Sucato Masonry, Inc.
John Talley and John Talley Construction Co., Inc.
State of Texas
U.S. Homes, Inc.
State of Utah
Wood Brothers Homes, Inc.
Wood Brothers Lumber Co.
Wooldridge Construction Co.
York Concrete Co., an Arizona general partnership, and York Concrete, Inc., an Arizona Corporation
Melvin Zuckerman

The following were class member/appellees in the lower court:

Allied Concrete, Inc.
Allied Concrete & Materials, Inc.
ARC Corporation and its subsidiaries Hydro Conduit Corp., Associated Sand and Gravel Co., Inc., Cement Products Corp. and ARC Materials Corp.
Arizona Public Service Company
Bromley & Sons Concrete, Inc.
Chandler Ready-Mix Company
City of Mountain Home, Arkansas
Columbia Building Materials, Inc.
Commonwealth of Massachusetts
County of Los Angeles and Flood Control District of Los Angeles County

Fabcon, Inc.
Formigli Corporation
General Paving Co.
Gulf Oil Corporation
Herr Lumber, Inc.
Robert B. Hertel
Johnson & Stewart Materials
Keith and Sons, Inc.
McBride & Son Companies
Mesa Sand & Rock
Monnah Park Block Co., Inc.
M.P.S. Industries, Inc.
New Jersey Lumber and Building Materials Dealer's Association
New Pueblo Materials, Inc.
Packaged Concrete, Inc.
Phoenix Sand & Rock
I.E. Shilling Co.
The Tanner Companies
Tri-City Ready Mix, Inc.
Union Rock & Materials, Inc.
Washington Public Power Supply System

The following parties together with their affiliated entities were defendants in the multidistrict proceedings and did not settle with the National Cement Class, and, as such, may have an interest in this matter:

Alpha Portland Industries, Inc.
Arkansas Cement Corp.
Arkansas-Louisiana Gas Co.
Ash Grove Cement Co.
Ashland Oil, Inc.
Canada Cement La Farge
Capital Aggregates, Inc.
Centex Cement Corp.
Centex Corp.
Citadel Cement Corp.
Columbia Cement Corp.
Coplay Cement Mfg. Co.

Crane Corp.
Cyprus Hawaiian Cement Corp.
Dundee Cement Corp.
F. Ili Buzzi S.P.A. Cement
Filtrol Corporation
The Flintkote Company
General Portland, Inc.
Genstar, Inc.
Giant Portland Cement Co.
Heidelberg Cement A.G.
Holderbank Financere Glaris, Ltd.
Ideal Basic Industries, Inc.
Kaiser Cement Corporation
Keystone Portland Cement Co.
Lehigh Portland Cement Co.
Lone Star Industries, Inc.
Louisville Cement Co.
The Marquette Company
Martin Marietta Corp.
Medusa Corporation
Missouri Portland Cement Co.
The Monarch Cement Co.
Monolith Portland Cement Co.
National Cement Co., Inc.
National Gypsum Co.
Nevada Cement Co.
OKC Corporation
Oregon Portland Cement Co.
H.K. Porter Co.
Portland Cement Association
Portland Cement Co. of Utah
San Antonio Portland Cement Co.
Santee Portland Cement Corp.
Societe des Cements Francis
Societe de Anonymes des Cements Vicat
Standard Oil Company (Indiana)
U.S. Steel Corporation and its Universal Atlas Cement Division
Valley Cement Industries, Inc.
Vigier Cement Ltd.

Whitehall Cement Company
Wyandotte Cement, Inc.
H.B. Zachry Company

Members of the National Cement Class (originally certified by Chief Judge Carl A. Muecke and later decertified by Chief Judge Manuel L. Real) and members of the Califorina and Oregon Governmental Classes may also be interested parties. *See In re Cement and Concrete Antitrust Litigation* (D. Ariz. 1981) 515 F.Supp. 1076, *petition for writ of mandamus denied,* (9th Cir. 1982) 688 F.2d 1297, *aff'd pursuant to 28 U.S.C. § 2109 sub nom. Arizona v. U.S. District Court* (1983) 459 U.S. 1191.

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No. 87-1862

In The

Supreme Court of the United States

October Term, 1987

STATE OF CALIFORNIA, *et al.*,

Appellants,

vs.

ARC AMERICA CORPORATION, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

BRIEF OF APPELLANT STATES

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, Jur. St. A-1 is reported at 817 F.2d 1435.

Pre-Trial Order 122, issued by the Honorable Manuel L. Real of the United States District Court for the Central District of California and filed on January 23, 1985, is not reported. This order is reproduced at Jur. St. A-27. The judgment based on Pre-Trial Order 122, dated February 4, 1985, is not reported. That judgment is reproduced at Jt. App. 104.

JURISDICTION

Appellants invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(2). The judgment of the United

States Court of Appeals for the Ninth Circuit was entered on May 27, 1987. A petition for rehearing and suggestion for rehearing *en banc* was timely filed on June 10, 1987. This petition was denied eight months later on February 9, 1988. The jurisdictional statement was timely filed within ninety days of that date and probable jurisdiction was noted by this Court on October 3, 1988.

CONSTITUTIONAL AND STATUTORY AUTHORITIES INVOLVED

Constitution of the United States

The Supremacy clause, art. VI, cl. 2, provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Federal Law and Authority

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

Section 4 of the Clayton Act, 15 U.S.C. § 15(a), provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust law may sue therefor in any district of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Alabama Law

Alabama Code § 8-10-1 provides:

> Any person or corporation who engages or agrees with other persons or corporations or enters, directly or indirectly, into any combination, pool, trust or confederation to regulate or fix the price of any article or commodity to be sold or produced within this state or any person or corporation who enters into, becomes a member of or party to any pool agreement, combination or confederation to fix or limit the quantity of any article or commodity to be produced, manufactured, mined or sold in this state must be fined, on conviction, not less than $500.00 nor more than $2,000.00.

Alabama Code § 6-5-60 provides:

> Any person, . . . injured or damaged by an unlawful trust combine or monopoly, or its effect, direct or indirect, may, in each instance of such injury or damage, recover the sum of $500.00 and all actual damages from any person, firm or corporation creating, operating, aiding or abetting such trust, combine or monopoly . . .

Arizona Law

Arizona Rev. Stat. § 44-1402 provides:

> A contract, combination or conspiracy between two or more persons in restraint of, or to monopolize, trade or commerce, any part of which is within this state, is unlawful.

Arizona Rev. Stat. § 44-1408A provides:

> The state, a political subdivision or any public agency threatened with injury or injured in its business or property by a violation of this article may bring an action for appropriate injunctive or other equitable relief, damages sustained and, as determined by the court, taxable costs and reasonable attorney's fees.

California Law

Section 1 of the Cartwright Act, Cal. Bus. & Prof. Code § 16720, provides:

> A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:
>
> (a) To create or carry out restrictions in trade or commerce.
>
> (b) To limit or reduce the production, or increase the price of merchandise or of any commodity. • • •
>
> (d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use, or consumption in this State. • • •

Business and Professions Code section 16726 provides:

> Except as provided in this chapter, every trust is unlawful, against public policy and void.

Business and Professions Code section 16750(a) provides:

> Any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by (California antitrust law), . . .

> may sue therefor . . . to recover three times the damages sustained by him or her, interest on his or her actual damages . . ., and shall be awarded a reasonable attorney's fee together with the costs of the suit.
>
> Such action may be brought by any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter, regardless of whether such injured person dealt directly or indirectly with the defendant.

Minnesota Law

Minn. Stat. § 325D.53, subd. 1(1)(a) (1986) provides:

> Without limiting section 325D.51, the following shall be deemed to restrain trade or commerce unreasonably and are unlawful:
>
> (1) A contract, combination or conspiracy between two or more persons in competition:
>
> (a) for the purpose or with the effect of affecting, fixing, controlling or maintaining the market price, rate or fee of any commodity or service.

Minn. Stat. § 325D.57 (1986) provides:

> Any person . . . injured directly or indirectly by a violation of (Minnesota antitrust law) shall recover three times the actual damages sustained, together with costs and disbursements, including reasonable attorneys' fees. In any subsequent action arising from the same conduct, the court may take any steps necessary to avoid duplicative recovery against a defendant.

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STATEMENT OF THE CASE

This appeal arises from settlements of class litigation against cement manufacturers for price fixing. This action had its origins in an antitrust investigation conducted by the Antitrust Division of the Arizona Attorney General's Office. With the aid of state investigative subpoenas, Arizona investigators uncovered evidence of a national conspiracy among cement manufacturers to fix and stabilize the price of their product in the face of declining demand and excess capacity. Jur. St. A-36. The Arizona investigation ultimately uncovered evidence of agreements governing virtually every aspect of the manufacture and sale of cement, ranging from agreements on the rate of return to be received by the industry and the formula for calculating transaction prices to the standardization of credit terms, product specifications and even trivial details such as night time unloading allowances. *Id.* Public agencies were major and necessary targets of the alleged conspiracy.[1]

On September 23, 1976, the State of Arizona filed its complaint on its own behalf and on behalf of subordinate Arizona public entities and agencies seeking damages, injunctive relief, attorney's fees, costs and alleged conspiracy in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. Jur. St. A-63. Also alleged were violations of the Arizona Antitrust Law. *Id.*

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1. Estimated use of United States cement production in the early 1970's was: Public works projects, 33 percent; public buildings, 13 percent; residential construction, 20 percent; industrial and commercial, 17 percent; farms, 5 percent; and other 4 percent. Lankard, *Cement and Concrete Technology for the Corrosion Engineer*, Materials Performance, Battelle, Columbus Laboratories, Columbus, Ohio (August 1976).

The States of California, Minnesota and Alabama thereafter each filed a complaint seeking damages and injunctive relief for an alleged conspiracy in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. Jur. St. A-86, A-103, A-120. Not only did each state allege violations of federal law, but the States of Arizona, Alabama, California and Minnesota, each alleged a violation of its state law. *Id.* Included within the claims for relief under the state statutes were claims based on indirect purchases of cement. *Id.*

Private plaintiffs filed "tag-along" complaints based on Arizona's investigation and filing. On September 12, 1977, the multi-district panel consolidated various cement actions in the United States District Court for the District of Arizona. *In Re Cement and Concrete Antitrust Litigation*, 437 F. Supp. 750 (J.P.M.D.L. 1977). The complaints filed by the States of California, Minnesota and Alabama were transferred to the Arizona District Court in 1977, 1979 and 1980 respectively. These actions proceeded on a coordinated basis with the other actions comprising MDL No. 296.

On March 9, 1978, the Honorable D.J. Muecke of the United States District Court for the District of Arizona certified classes of cement purchasers pursuant to Rule 23 of the Federal Rules of Civil Procedure. *In Re Cement and Concrete Antitrust Litigation*, 1979-1 Trade Cases (CCH) ¶ 62,502 (1979).[2]

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2. The four classes certified were as follows: (1) a National Cement Class constituted of all those who purchased cement during the relevant period other than defendants and mem-

(Continued on following page)

Between July 31, 1979 and October 23, 1981, seven class settlements were entered by all plaintiffs, including appellant states, and seven defendants. The monies from these settlements constitute the settlement fund here at issue. The settlements embraced all claims pertaining to any direct or indirect purchase of cement or cement-containing products asserted under any federal or state antitrust law, or based upon any allegations similar to any allegations in the underlying cement litigation. To achieve these settlements on behalf of all plaintiffs, California alone compromised state law claims based on indirect purchases of over 11 million tons of cement. Jt. App. 60.

On January 6, 1984, the district court decertified the National Cement Class. *In re Cement Concrete Antitrust Litigation*, 817 F.2d 1435, 1438 (9th Cir. 1987). The decertification order provided that absent class members retained their eligibility to participate in the settlements. *Id.*

During the period May 31, 1984 through January 11, 1985, plaintiffs and class members filed briefs concerning the distribution of the settlement fund. Among the issues contested was whether the states were entitled to compensation for indirect purchases which had been asserted as pendent state law claims.

(Continued from previous page)

bers of other classes; (2) the California Governmental Class consisting of the State of California and its political subdivisions; (3) the similarly constituted Oregon Governmental Class; and (4) an Arizona Ready-Mix Class made up of entities that purchased ready-mix concrete for delivery within Arizona. *id.* In 1979, the Ready-Mix class settled its action and a partial judgment was entered on July 8, 1980 (*In Re Cement and Concrete Antitrust Litigation*, 817 F.2d 1435, 1438 (9th Cir. 1987).)

Hearings were held on November 9, 1984 and January 14, 1985, concerning the various proposals for distribution of the settlement funds. On January 23, 1985, Judge Manuel L. Real entered Pre-Trial Order No. 122, which disallowed any recovery to the States based on their state law claims for indirect purchases. Jur. St. A-27. Judge Real's order provided in relevant part:

> (2) . . . (States' downstream purchaser statutes) are clear attempts to frustrate the purposes and objectives of Congress, as interpreted by the Supreme Court in *Illinois Brick*, and, accordingly are preempted by federal law. Jur. St. A-30-31.

Judgment was entered on Pre-Trial Order No. 122, pursuant to Rule 54(b) on February 4, 1985. The effect of the trial court's ruling was to leave appellants without any remedy for the overwhelming majority of their purchases of price-fixed cement, and cement-containing products. Alabama, Arizona, California, Minnesota, and others timely appealed to the Ninth Circuit.

The United States Court of Appeals for the Ninth Circuit determined that the supremacy clause issue presented by this appeal could be resolved without reference to the legislative record of the federal antitrust laws. *In Re Cement and Concrete Antitrust Litigation*, 817 F.2d 1435, 1444-1447 (9th Cir. 1987). Using as a proxy for congressional intent the decision of this court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the Ninth Circuit concluded that "state law claims in this case based on indirect purchases of cement that do not fall within any exception to the rule of *Illinois Brick* are preempted because they stand 'as an obstacle to the accomplishment of the full purposes

and objectives'' of federal antitrust law. (citation omitted).'' *Cement*, 817 F.2d at 1447.

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SUMMARY OF ARGUMENT

The critical issue in this appeal is ''whether Congress intended that federal regulation supercede state law.'' *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 369 (1986). The downstream purchaser remedies contained in States' antitrust laws are an exercise of traditional state police power to protect states' citizens and economies from unlawful price-fixing. These remedies advance the express policies of Congress without frustrating the federal enforcement scheme created by *Illinois Brick*. The downstream remedy provisions of the antitrust laws of appellants Alabama, Arizona, California, and Minnesota, and claims based thereon, are therefore valid under the supremacy clause.

The legislative history of the federal antitrust laws demonstrates that Congress has consistently supported compensation for victims of anticompetitive conduct as well as vigorous enforcement by the states of their own antitrust laws. The long tradition of concurrent state and federal restraints on anticompetitive conduct precludes the conclusion reached below that state antitrust remedies are preempted notwithstanding the absence of an express congressional statement of that intention. Congress has not expressly or impliedly preempted the state law remedies at issue in this appeal. Indeed, Congress has approved a District of Columbia antitrust statute which

specifically authorizes recoveries by downstream purchasers.

The decision below ignores the legislative record of the federal antitrust laws and conflicts with a thoughtful decision of the California appellate courts[3] and the views of independent scholars.[4] The lower court determined that state remedies for downstream purchasers are preempted ''because they stand 'as an obstacle to the accomplishment of the full purposes and objectives' of federal antitrust law. (citation omitted).'' *In Re Cement And Concrete Antitrust Litigation*, 817 F.2d 1435, 1447 (9th Cir. 1987). The lower court failed to identify the relevant underlying purposes of these laws and therefore found conflicts with policies which cannot be attributed to Congress.

The fundamental error of the lower court was an overbroad reading of this Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). In *Illinois Brick*, this Court determined that actions under section 4 of the Clayton Act on behalf of admittedly injured downstream purchasers would thwart the economical enforcement of fed-

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3. *Crown Oil Corp. v. Superior Court*, 177 Cal.App.3d 604 (1986), *rev. denied* 177 Cal.App. 3d 614 (Cal. Sup. Ct. 1986), *app. dism. sub nom. Crown Oil Corp. v. Lapidus Popcorn, Inc.*, 479 U.S. 879 (1986); *see also In re Chicken Antitrust Litigation*, 588 F.2d 228, 238-239 (5th Cir. 1982), state downstream purchaser remedies assumed valid and *In re Sugar Antitrust Litigation*, 588 F.2d 1270, 1273 (9th Cir. 1978) *cert. den.* 441 U.S. 932 (1979), state remedies stated to be not preempted in *dicta*.

4. *See* Note, *State Indirect Purchaser Statutes: The Preemptive Power of Illinois Brick*, 62 Boston U.L. Rev. 1241 (1982); Note, *Indirect Purchaser Suits Under State Antitrust Laws: A Detour Around the Illinois Brick Wall*, 34 Stan.L.Rev. 203 (1981).

eral antitrust law. *Id.* at 746. There is no suggestion in *Illinois Brick* that states are precluded from providing remedies for those injured in fact by anticompetitive conduct.

Even so, the lower court hypothesized three broadly preemptive federal purposes from *Illinois Brick*: "(1) avoiding unnecessarily complicated litigation; (2) providing incentives to direct purchasers to bring private damages actions; and (3) avoiding multiple liability for defendants." *Cement,* 817 F.2d at 1445. However, there is no basis in the legislative record for granting preemptive effect to these policies. These are policies limited by *Illinois Brick* itself to the federal system.

The downstream purchaser remedies of states' laws do not jeopardize nor indeed necessarily impinge upon the federal enforcement system as construed by *Illinois Brick.* States' laws do not create an "actual conflict" between federal and state law. State law remedies for downstream victims of price-fixing do not frustrate recoveries under the Clayton Act. To the contrary, states' remedies for downstream victims of anticompetitive conduct *advance* broad congressional policies of compensation for victims of price-fixing and deterrence of conduct which is *per se* unlawful under federal and state law.

A fundamental aspect of state sovereignty in the federal system is the power of states to supplement federal penalties to provide compensation for victims of unlawful conduct. While this can occasionally yield harsh results, this authority has been approved with respect to sequentially imposed criminal penalties, and the recovery of dam-

ages and imposition of state civil penalties. Moreover, there is no demonstrated overlap between the claims of direct and downstream purchaser claims in this case. *A fortiori,* the claims in this case on behalf of taxpayers based on states' laws for recovery of overpayments due to a price-fixing conspiracy are lawful.

ARGUMENT

I. STATE PROTECTION OF DOWNSTREAM VICTIMS OF ANTI-COMPETITIVE CONDUCT IS AN APPROPRIATE AND LAWFUL EXERCISE OF TRADITIONAL STATE POLICE POWER.

States' laws are protected by a strong presumption of validity. *Maryland v. Louisiana,* 451 U.S. 725, 746 (1981); *New York State Dept. of Social Services v. Dublino,* 413 U.S. 405, 413 (1973). This presumption is strongest where, as here, the state statute is an exercise of traditional state police power. *Hunt v. Washington St. Apple Advertising Comm.,* 432 U.S. 333, 350 (1977). Any attempt to oust a statute of a sovereign state under the Supremacy clause "faces an uphill battle." *Hillsborough County v. Automated Medical Laboratories, Inc.,* 471 U.S. 707, 714 (1985). Congress will not be presumed to have foreclosed by silence a remedy for victims of unlawful conduct. *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 251 (1984); *United Construction Workers v. Laburnam,* 347 U.S. 656, 663-664 (1954). Moreover, longstanding state regulation in an area supports a virtually conclusive presumption that

state law in that area cannot be preempted by implication, *CTS Corp. v. Dynamics Corp.*, 107 S.Ct. 1637, 1648 (1987).

A. Regulation of Anticompetitive Conduct Is a Traditional Use of State Police Power Which Pre-Dates the Enactment of the Federal Antitrust Laws.

Massachusetts regulated monopolies while it was still an English colony. The colonial legislature provided in 1641 that: "there shall be no monopolies among us but of such new inventions as are profitable to the country, and that for a short time." Ch. 71 (1641); Charters and General Laws of the Colony and Province of Massachusetts Bay 170 (1814). Virginia and Massachusetts included anti-monopoly provisions in their state constitutions during the 18th century. Va. Bill of Rights § 4; Mass. Const. Part 1, Art. 6 (1780); *see also* Conn. Const. Art. 1, § 1 (1818). Subsequently, several states, including appellant State of Alabama, enacted constitutional provisions prohibiting trusts and combinations in restraint of trade. Ala. Const., Art. IV, § 103; Tex. Const., Art. 1, § 26; Va. Const., Art. 12, § 165.

During the 19th Century, states continued to enact laws to protect competition. A number of mid-western states pioneered legislation to control the anticompetitive conduct of powerful railroads within their jurisdictions. Letwin, *Congress and the Sherman Antitrust Law:* 1887-1890, 23 Chi L.R. 221, 233 (1956). During the middle to late 19th century, states enacted specific legislation directed at controlling pools, trusts, and other restraints of trade. 1 Von Kalinowski, Antitrust Laws and Trade Regulation § 2.02(3)(c); *see also State v. Duluth Bd. of Trade*, 107 Minn. 506, 121 N.W. 395, 407 (1909), discussing state

antitrust laws in force at the end of the 19th century. By the time the Sherman Antitrust Act was being debated, 21 states had enacted their own antitrust laws or had provisions in their constitutions addressing restraints of trade. Limbaugh, *Historic Origins of Anti-trust Legislation*, 18 Mo. L. Rev. 215,246 (1953).[5]

In this century, state prosecutors and state antitrust law have played a substantial, and increasingly important, role in combatting anticompetitive conduct. Scher, *Rising Antitrust, Consumer Protection Activities of State Attorneys General*, N.Y. Law J. 1 (June 10, 1988); Constantine, *Current Antitrust Enforcement Initiatives by State Attorneys General*, 56 Antitrust L.J. 99 (1987); Mosk, *State Antitrust Enforcement and Coordination with Federal Enforcement*, 21 ABA Antitrust Section 358-369 (1962); Bicks, *Appropriate Role Under our Federal System for a State Antitrust Enforcement Program*, Antitrust Bulletin 503 (1960). Indeed a former head of the Antitrust Division of the United States Department of Justice has predicted that by the year 1996, antitrust law "will be primarily enforced by the states." Baxter, *What Will Be the State of Antitrust in the Year 1996?*, 1 Antitrust 32 (Winter, 1986).

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5. In states without specific antitrust statutes, state courts refused to enforce price fixing and market division agreements as void against public policy under state common law. *See, e.g., Richardson v. Buhl*, 77 Mich. 632 (1889), *reprinted at* 21 Cong. Rec. 2458 (1890). Between 1887 and 1890, the attorneys general of Louisiana, Illinois, California, New York, and Nebraska challenged the anti-competitive activities of trusts as *ultra vires* of their state corporate charters. Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 Chi. L. Rev. 221, 244-245 (1956); *see, e.g., California v. American Sugar Refining Co.*, 7 Ry. & Corp. L.J. 83 (1890), corporation dissolved on theory that it had improperly surrendered control of its business to the Sugar Trust.

B. The Downstream Purchaser Remedies of States' Laws Authorize Compensation for Those Who Are Injured in Fact by Anticompetitive Conduct.

The State statutes at issue in this appeal each provide a remedy under state antitrust law for downstream victims of anticompetitive conduct. However, each state's antitrust remedy is to some extent unique. California's Cartwright Act provides for recovery of treble plaintiff's injuries plus attorney's fees and costs. Cal. Bus. & Prof. Code § 16750(a). A determination of the extent of antitrust injuries actually sustained is "essential to the indirect purchaser's California claim." *Union Carbide Corp. v. Superior Court*, 36 Cal.3d 15, 23 (1984). California law does not require that a direct purchaser pay over a portion of its Clayton Act recovery to downstream purchasers. *Crown Oil Corp. v. Superior Court*, 177 Cal.App.3d 604, 612 n. 5, *app. dism. for want of juris. sub. nom. Crown Oil Corp. v. Lapidus Popcorn, Inc.*, 479 U.S. 879 (1986). While the issue has not been squarely presented to a California appellate court, *dicta* indicates that "when the threat of double recovery occurs, (California trial courts) will fashion relief" to avoid such a result. *Id.* at 613.

Minnesota law also provides for the recovery of three times the actual damages sustained, together with costs and reasonable attorneys' fees. Minn. Stat. § 325D.57. In carrying out this provision, Minnesota courts are statutorily obligated to "take any steps necessary to avoid duplicative recovery against a defendant." *Id.* Only "actual damages sustained" by a downstream purchaser are cognizable under Minnesota's statute. *Id.*

In a provision which predates the Clayton Act, Alabama's antitrust law provides for the recovery of $500 and

"all actual damages." Ala. Code § 6-5-60 (Code of 1907). Arizona's antitrust law provides in actions such as this on behalf of governmental entities for "damages sustained," or single damages, plus taxable costs and reasonable attorney's fees. Az. Rev. Stat. Ann. § 44-1408A. Like the statutes of California and Minnesota, the laws of Alabama and Arizona are keyed to those injuries actually suffered by a downstream purchaser.

Provision by the states for comprehensive remedies for all victims of anticompetitive conduct, including those not in privity with price-fixers, is like all state antitrust law "bottomed on those police powers which are inherent rights of sovereignty". *State ex inf. Hadley, Attorney General v. Standard Oil Co.*, 218 Mo. 1, 116 S.W. 902, 1020 (1908); *see also Alfred M. Lewis, Inc. v. Warehousemen, Etc. Local No. 542*, 163 Cal. App.2d 771, 790, 330 P.2d 53, 64 (1958).

C. The Downstream Purchaser Remedies Contained in States' Laws are Rationally and Substantially Based on Antitrust Economics and Experience.

In 1890 during consideration of the Sherman Act, Senator George noted that a middleman: "buys only for profit on a subsequent sale (s)o whatever he pays he receives when he sells, together with a profit . . . (until) . . . (t)he consumer, therefore, paying all the increased price advanced by the middlemen and profits on the same, is the person necessarily damnified or injured." 21 Cong. Rec. 1767 (1890). That an anticompetitive overcharge may be substantially, if not completely, passed-on by middlemen to ultimate purchasers has long been recognized. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977); *In Re Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), *cert.*

denied 415 U.S. 919 (1974). Consistent with the comments of Senator George, courts have also observed that a middleman can both pass on an anticompetitive overcharge *and* increase his profits. *State of W. Va. v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1084 (2d Cir. 1971).

The rate at which middlemen will pass-on an anticompetitive overcharge to downstream purchasers is generally determined by the elasticities of supply and demand in a market. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 741 (1977). Elasticity represents the relationship between price and the quantity either demanded or sold. P. Samuelson & W. Nordhaus, Economics (12th ed.) 379-386 (1985); *see also* Gellhorn, *An Introduction to Antitrust Economics*, 1975 Duke L.J. 1, 19-22 (1975).

In the context of determining the rate at which a direct purchaser-middleman passes-on an anticompetitive overcharge, pass-on will be total when demand is inelastic or supply is elastic, and *de minimis* or zero when demand is elastic or supply inelastic. Harris & Sullivan, *Passing On The Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. Pa. L.R. 269, 283-287 (1979); *see also* Schaefer, *Passing-On Theory In Antitrust Treble Damage Actions: An Economic and Legal Analysis*, 16 Wm. & Mary L.R. 883, 887-897 (1975). Products which have been the subject of price-fixing are typically marked by inelastic demand. Erickson, *Economics of Price Fixing*, 2 Antitrust L. & Econ. Rev. 83, 86-87 (1969); Posner, *Oligopoly And The Antitrust Laws: A Suggested Approach*, 21 Stan. L. Rev. 1562, 1569-75, 1603-04 (1969); *see also* Hay & Kelley, *An Empirical Survey Of Price Fixing Conspiracies*, 17 J. of Law & Econ. 13, 25 n. 16 (1974). Pragmatically, this makes sense because as a rational price fixing conspiracy "raises the price above the non-collusive level, there must not be a relatively larger drop in sales volume; higher prices must mean higher total revenue." Kuhlman, *Nature And Significance Of Price Fixing Rings*, 2 Antitrust L. & Econ. Rev. 69, 72-73 (1969). Conversely, supply is likely to be relatively elastic. Harris & Sullivan, *Passing On The Monopoly Overcharge, supra* 128 U. Pa. L.R. at 290. The economic bottom line is that "in a multiple-level chain of distribution, *passing on monopoly overcharges is not the exception: it is the rule.*" *Id.* at 276 (emphasis in the original); *see also* Schaeffer, *Passing-On Theory In Antitrust Treble Damage Actions, supra*, 16 Wm. & Mary L.R. at 897-900.

The stark implication of economic analysis is that downstream purchasers will bear the brunt of a price fixing conspiracy in most cases. They are the persons who, in Senator George's words, are "injured or damnified" by price-fixing. 21 Cong. Rec. 1767 (1890).

Nine states and the District of Columbia[6] in addition to appellant states have therefore chosen to explicitly

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6. D.C. Code Ann § 28-4509(a) (1981); Hawaii Rev. Stat. § 480-14 (1984); Ill. Ann. Stat. ch. 38, ¶ 60-7 (Smith-Hurd Supp. 1988); Md. Com. Law Code Ann. § 11-209 (1983 & Supp. 1987); Mich. Comp. Laws Ann. § 445.778 (West Supp. 1987); Miss. Code Ann. § 75-21-9 (1973); N.M. Stat. Ann. § 57-1-3(A) (Supp. 1987); R.I. Gen. Laws § 6-36-12(g) (1985); S.D. Codified Laws Ann. § 37-1-33 (1986); Wis. Stat. Ann. § 133.18 (West Supp. 1987). Appellant state of Arizona's law does not explicitly recognize downstream purchaser claims. However, Arizona law incorporates by reference federal law at the time of its enactment. Ariz. Rev. Stat. Ann. § 44-1412, *In re Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973) *cert. denied* 415 U.S. 919 (1974).

provide remedies for downstream victims of anti-competitive conduct. Recognizably, these remedies are rationally and substantially based on antitrust economics and experience.

II. THE LEGISLATIVE RECORD OF THE FEDERAL ANTITRUST LAWS UNEQUIVOCALLY SUPPORTS THE VALIDITY OF THE REMEDIAL PROVISIONS OF STATES' LAWS.

"The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supercede state law." *Louisiana Public Service Comm. v. FCC*, 476 U.S. 355, 369 (1986). That intention is most directly and properly expressed in legislative text. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Preemptive intent can be inferred from federal occupation of an entire field of law, *Hines v. Davidowitz*, 312 U.S. 52 (1941), or from an actual conflict between state and federal law so direct that "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or when state law "stands as an obstacle to the accomplishment and execution" of federal law. *See generally Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984). This appeal presents a case of asserted obstacle preemption. However, "as in any pre-emption analysis, 'the purpose of Congress is the ultimate touchstone.'" *Fort Halifax Packing Co. v. Coyne*, 107 S.Ct. 2211, 2216 (1987).

The intent or purpose of Congress to oust the law of a sovereign state must be "clear and manifest". *Rice v.*

Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Particularly when preemption is to be implied from the failure of Congress to act on a subject, expressions of congressional intent cannot be subtle. *Puerto Rico Dept. of Cons. Affairs v. Isla Petroleum*, 108 S.Ct. 1350, 1353 (1988). This clear expression requirement assures that state laws are ousted only by Congress which, by design within the federal system: "will partake sufficiently of the spirit (of the States), to be disinclined to invade the rights of the individual States, or the prerogatives of their governments." The Federalist No. 46 (Madison), (B. Wright ed. 1961) 332, quoted in *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528, 551 (1985).

Without any reference to the legislative record of the federal antitrust laws, the lower court hypothesized three preemptive "purposes or objectives of federal antitrust law". 817 F.2d at 1445. These were the objectives of "(1) avoiding unnecessarily complicated litigation; (2) providing incentives to direct purchasers to bring private damages actions; and (3) avoiding multiple liability for defendants." *Id.* These asserted policies can have preemptive effect if, and only if, the text and legislative history of the federal antitrust laws demonstrate both that these were indeed the policies of Congress, and that Congress intended that federal law displace state law with respect to these policies.

A. The Text and Legislative History of the Sherman Act Support the Validity of the Downstream Remedy Provisions of States' Laws.

Congressional efforts to address anticompetitive conduct can be dated from the introduction of a resolution by

Senator Sherman on July 10, 1888 to have the Senate Finance Committee study and report on measures to control anticompetitive "combinations (which) advance the cost to the consumer of necessary articles of human life." 19 Cong. Rec. 7 (1888).

By 1890, Congress was ready to address the trust issue legislatively. Senator Sherman's S. 1 became the vehicle for Senate debate on antitrust legislation. Section 1 of the bill mirrored the provisions of the Senator's resolution of 1888. It prohibited "all arrangements" . . . which tend to prevent full and free completion . . . (or) which tend to advance the cost to the consumer; declared such arrangements void as against public policy; and authorized the Attorney General to enjoin the trusts. S. 1, 51st Cong., 2d Sess. § 1 (1890). Section 2 authorized "*any person or corporation injured or damnified* by (prohibited anticompetitive conduct to recover) twice the amount of *damages sustained* and the costs of the suit, together with a reasonable attorney's fee." *Id.* § 2 (emphasis added). Senator George described the Senate's understanding of this provision as follows:

> An advance in price to the middlemen is not mentioned in the bill, for the obvious reason that no such advances would damnify them; it would rather be a benefit, as it would increase the value of the goods he has on hand. He buys to sell again. He buys only for profit on a subsequent sale. So whatever he pays he receives when he sells, together with a profit on his investment; and so all of them, including the last, who sells directly to the consumer. *The consumer, therefore, having all the increased price advanced by the middlemen and profits on the same, is the party necessarily damnified or injured.* 21 Cong. Rec. 1767 (1890) (emphasis added).

Senator Sherman's bill was subsequently amended by a committee substitute crafted in the Senate Judiciary Committee. This substitute ultimately became the Sherman Antitrust Act. Act of July 2, 1890, 26 Stat. 209, 51st Cong., 1st Sess.; reprinted at App. B. Section 7 provides a remedy for "(*a*)ny person who shall be injured . . . (to the extent of) . . . threefold the damages *sustained by him.*" *Id.* With the exception of the change from double to treble damages, the operative language of this section is virtually identical to the analogous provisions in S. 1, as explained by Senator George.

Just as the private remedy provision of the original Sherman bill was augmented to provide for treble damages, the committee substitute introduced an additional deterrent to price-fixing in the form of a forfeiture provision. This provided that "(a)ny property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) . . . and being in the course of transportation from one state to another, or to a foreign country, shall be forfeited to the United States . . .". S. 1, 51st Cong., 1st Sess. § 6 (April 2, 1890); *see also* Act of July 2, 1890, 26 U.S. Stat. 209, 51st Cong. 1st Sess. § 6; 15 U.S.C. § 6. For trusts operating in numerous states, this could lead to the seizure of substantial amounts of property for violating the new antitrust law.

Taking these provisions together, the Congress contemplated that a price-fixer would be subject to cumulative federal penalties and remedies of: imprisonment and fine, injunction, seizure of potentially substantial amounts of property, sold or not, covered by a price-fix, *plus* treble

damages and costs for "[a]ny person" injured by the trust. This "stack" of penalties and remedies makes clear that compensation for victims of anticompetitive conduct was not to be foreclosed simply because the price-fixer had already paid federal penalties.

Even if extension by states of a remedy for those injured in fact by anticompetitive conduct was not clearly consistent with the compensatory policies of the Sherman Act, it would still be completely clear that Congress did *not* intend for the Sherman Act to displace state antitrust law. By the time the Sherman Act was debated, 21 states had enacted legislation to deal with trusts and other restraints of trade, or had constitutional provisions prohibiting monopolies, trusts or price fixing.[7] In other states, courts had invoked state common law to deal with aspects of the trust problem, some with notable success.[8] Accord-

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7. States with statutes dealing with trusts and other restraints of trade prior to 1890 included Iowa, Kansas, Kentucky, Maine, Michigan, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, South Dakota, Tennessee, Texas, Washington, and Wyoming. States with constitutional provisions addressing restraints of trade prior to enactment of the Sherman Act included Arkansas, Connecticut, Georgia, Indiana, Kentucky, Maryland, Montana, North Carolina, North Dakota, South Dakota, Tennessee, Texas, Washington and Wyoming. Thorelli, The Federal Antitrust Policy 155 (1955); *see also* Jones, *Historical Development of the Law of Business Competition*, 35 Yale L.J. 905-938 (June 1926), 36 Yale L.J. 42-55 (Nov., 1926), 207-234 (Dec., 1926); Seager & Gulick, Trust and Corporation Problems 341-342 (1929).

8. *See* e.g. *Chicago Gas Co. v. Peoples' Gas Co.*, 121 Ill. 530 (1887), common law bar to enforcement of a market division agreement between competitors; *Mallory v. Hanauer Oil Works*, 86 Tenn. 598 (1888), combination of 5 cottonseed oil manufacturers barred; *Richardson v. Buhl*, 77 Mich. 632 (1889), contract to create a monopoly in match industry unlawful under common law.

ing to Senator Sherman, federal antitrust legislation was intended:

> to *supplement* the enforcement of the established rules of the common and statute law by the courts of the several States in dealing with combinations that affect injuriously the industrial liberty of the citizens of these States. It is to arm the Federal courts within the limits of their constitutional power that they may *cooperate* with the State courts in checking, curbing and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States. 21 Con. Rec. 2547 (1890) (emphasis added).

The legislative record of the Sherman Act affirmatively demonstrates that Congress had *no intent* to dispossess state antitrust law.

B. The Text and Legislative History of the Clayton Act Support the Validity of the Remedial Provisions of States' Laws.

The Clayton Act, 15 U.S.C. § 15(a), was the next major piece of federal antitrust legislation. This measure was designed to "supplement" the Sherman Act. Report of the Senate Committee on the Judiciary, S. Rep. No. 698, 63rd Cong., 2d Sess. 1 (July 22, 1914) *reprinted in* 2 Kintner, The Legislative History of the Federal Antitrust Laws 1744 (1978). The legislation sought to "make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by (the Sherman Act), or other existing antitrust acts." *Id.*

Congress made plain that compensation for injured parties remained an important congressional goal. The report of the House Judiciary Committee states:

> Section 5 (later renumbered § 4) is supplementary to the existing laws, and *extends* the remedy under section 7 of the Sherman Act to persons injured in their business or property by the wrongful acts of persons or combinations violating *any* of the antitrust laws, and allows the recovery of threefold damages therefor. H.R. Rep. No. 627, Pt. 1, 63rd Cong., 2d Sess. 14 (May 6, 1914) *reprinted in* 2 Kintner, The Legislative History of The Federal Antitrust Laws 1094 (1978) (emphasis added).

Representative Webb pointed out that private actions under the Clayton Act were conceived primarily as "'Open(ing) the door of justice to *every man, whenever he may be injured* by those who violate the antitrust laws, and giv(ing) the injured party ample damages for the wrong suffered.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n. 10 (1977) *quoting* 51 Cong. Rec. 9073 (1914) (emphasis added). Congressman Graham, arguing against strengthening the Sherman Act, stated that the "the existing remedy which *every individual* has of suing for treble damages and costs of suit and a reasonable attorney's fee for any violation of the Sherman Act (provided) . . . sufficient inducements to *any aggrieved party* or his counsel to use under existing law." H.R. Rep. No. 627, Pt. 2, 63rd Cong., 2d Sess. 9 (Minority Views) *reprinted in* 2 Kintner, The Legislative History of the Federal Antitrust Laws 1131 (1978) (emphasis added).

With respect to the relationship of state to federal antitrust law, the debates on the Clayton Act, like those on the Sherman Act, are premised on active state enforcement of state antitrust law. At one point in the debate, Senator Reed asks "if it is not a fact that the most potential enforcement we have had of the antitrust law, the most

successful results, has been by the attorneys general of States?" 51 Cong. Rec. 14478 (1914). Like the Sherman Act, the Clayton Act was designed to supplement state efforts against trusts. For example, the House Judiciary Committee Report states that "[T]he necessity for such legislation is shown by the fact that 19 States have enacted laws forbidding this particular form of discrimination within their borders . . . It is important that these state statutes be *supplemented by additional legislation by Congress*". H.R. Rep. No. 627, Pt. 1, 63rd Cong. 2d Sess. 9 (May 6, 1914) *reprinted in* 2 Kintner, Legislative History of the Federal Antitrust Laws 1091 (1978) (emphasis added). Indeed, one of the statutes which the Clayton Act was supplementing was the antitrust statute of appellant State of Alabama which had extended a remedy to indirect purchasers in 1907. Ala. Code § 6-5-60, § 2487 Code of Ala. (1907).

The text and debates on the Clayton Act demonstrate Congress' intent to compensate injured purchasers of price-fixed goods. Since states' laws tie recovery to injury irrespective of a privity relationship with a price-fixer, states laws are completely consistent with the intent and purposes of Congress as expressed during consideration of the Clayton Act.

C. The Legislative History of the Hart-Scott-Rodino Act Supports the Validity of States' Downstream Purchaser Remedies.

A little over 50 years after enactment of the Clayton Act, Congress amended Section 4 of the Clayton Act to authorize *parens patriae* suits by state attorneys general on behalf of citizens injured by anticompetitive conduct. This step was taken in response to an invitation to legislative action contained in *California v. Frito-Lay*, 474 F.2d

774 (9th Cir. 1973) *cert. denied* 412 U.S. 908 (1973). H. Rep. No. 94-499, 94th Cong., 1st Sess. 8 *reprinted in* 1976 U.S. Code Cong. & Admin. News 2577-78.

In accepting the Ninth Circuit's invitation to action, the Congress echoed statements made in debates on both the Sherman and Clayton Acts. In an updated version of Senator George's comments on what became Section 7 of the Sherman Act, the House Judiciary Committee Report states:

> The economic burden of many antitrust violations is borne in large measure by the consumer in the form of higher prices for his goods and services. This is especially true of such common and widespread practices as price-fixing, which usually result in higher prices for the consumer, *regardless of the level in the chain of distribution at which the violation occurs.* H. Rep. No. 94-499, 94th Cong., 1st Sess. 3, *reprinted in* 1976 U.S. Code Cong. & Admin. News 2573 (emphasis added.

Likewise, the Senate report states that "(t)he economic burden of most antitrust violations is borne by the consumer in the form of higher prices for goods and services," S. Rep. No. 94-803, 94th Cong., 1st Sess. 39. Congressman Rodino stated:

> (A)ssuming the State attorney general proves a violation and proves that an overcharge was 'passed on' to the consumers, injuring them 'in their property'; that is, their pocketbooks-recoveries are authorized by the compromise bill *whether or not consumers purchased directly from the price-fixer, or indirectly, from intermediaries, retailers, or middlemen.* 122 Cong. Rec. H10295 (daily ed. September 16, 1976) (emphasis added).

By the enactment of the Hart-Scott-Rodino Act in 1976, Congress also demonstrated support for state action

against price-fixers. The House report characterized a state attorney general as "an effective and ideal spokesman for the public in antitrust cases, because a primary duty of the State is to protect the health and welfare of its citizens." H. Rep. 94-499, 94th Cong., 1st Sess. 5, *reprinted in* 1976 U.S. Code Cong. Rec. & Admin. News 2575. Congress also authorized substantial financial support for state antitrust enforcement. 42 U.S.C. § 3739 ($30 million authorized). In addition, federal antitrust authorities were required to cooperate with state antitrust officials. 15 U.S.C. § 15f.

This history affirmatively supports the policy of compensation for injured victims of anticompetitive conduct embodied in the remedial provisions of states' laws.

D. Congress Has Implicitly Approved a District of Columbia Statute Which is Virtually Identical to the State Laws at Issue in this Appeal.

In 1980, the District of Columbia enacted its first comprehensive antitrust law. Unlike the laws of states, District of Columbia legislation is subject to congressional review and potential veto by the Congress under the District of Columbia Self-Government and Governmental Reorganization Act. Pub. Law 93-198, 87 Stat. 774 (1973), D.C. Code § 1-102 *et seq.*[9] The report of the Council of the District of Columbia makes plain that the rule of *Illinois Brick* was not to be incorporated into District law and that injured downstream victims of anticompetitive conduct had a remedy in District courts even if direct pur-

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9. Under Article 1, cl. 8, § 17 of the Constitution, Congress exercises exclusive legislative authority over the District of Columbia which authority "includes all the legislative powers which a state may exercise over its affairs." *District of Columbia v. Carter,* 409 U.S. 418, 429 (1972).

chasers had recovered "treble damages in full" in a federal proceeding. Report of the Council of the District of Columbia, Bill 3-107, the District of Columbia Antitrust Act of 1980 16-17 (Oct. 8, 1980), Jur. St. A-167.[10] Pursuant to the D.C. Self-Government Act, this legislation was transmitted to the Congress as D.C. Act. No. 3-300. Leg. history of Law 3-169, D.C. Code Ann. § 28-4501. Not a single resolution of disapproval was introduced in either House concerning this legislation, and it therefore became law without objection. *Id.*

As the District Court for the District of Columbia has observed in a non-antitrust case: "(i)t is difficult to reconcile this control exercised by Congress (under the D.C. Self-Government Act) and its implicit approval of the legislation with the concept that a law subject to the 30-day review period (provided by the Act) violates the Supremacy Clause." *Barnes v. District of Columbia,* 611

10. D.C. Code Ann. § 28-4509 provides:

> (a) Any indirect purchaser in the chain of manufacture, production, or distribution of goods or services, upon proof of payment of all or any part of any overcharge for such goods or services, shall be deemed to be injured within the meaning of this chapter.
>
> (b) In actions where both direct and indirect purchasers are involved, a defendant shall be entitled to prove as a partial or complete defense to a claim for damages that the illegal overcharge has been passed on to others who are themselves entitled to recover so as to avoid duplication of recovery of damages.
>
> (c) In any case in which claims are asserted by both direct purchasers and indirect purchasers, the court may transfer and consolidate cases, apportion damages and delay disbursement of damages to avoid multiplicity of suits and duplication of recovery of damages, and to obtain substantial fairness.

F.Supp. 130, 135 (D.D.C. 1985). The implicit approval of downstream purchaser remedies for the District by Congress belies any suggestion that it intends that such remedies be preempted. There is simply no basis for asserting that Congress has ever intended that state law remedies like those at issue in this appeal be displaced by federal law.

III. THE REMEDIAL PROVISIONS OF STATES' ANTITRUST LAWS DO NOT CONFLICT WITH THE FEDERAL ENFORCEMENT SCHEME.

A. States' Remedies for Downstream Purchasers Do Not Create An Actual Conflict with Federal Law.

Given the longstanding prevalence of state antitrust law, if Congress had intended to preempt the remedial provisions of states laws, it would have said so explicitly. *Cf. CTS Corp. v. Dynamics Corp.,* 107 S.Ct. 1637, 1648 (1987). A state law should be struck down by implication "only if it mandates or authorizes conduct that necessarily constitutes a *violation* of the antitrust laws in all cases.'" *Fisher v. City of Berkeley,* 475 U.S. 260, 265 (1986) *quoting Rice v. Norman Williams Co.,* 458 U.S. at 661 (emphasis added).

In this case, there is no conflict between federal and state law concerning conduct. Both the Sherman Act and the substantive provisions of states' antitrust laws proscribed price fixing as *per se* unlawful. *Alton Box Bd. Co. v. Esprit de Corps,* 682 F.2d 1267, 1274 n. 11 (9th Cir. 1982 (conduct standard identical under federal and California law); Ala. Code § 8-10-1 & 8-10-2, *Dothan v. Espy,* 220 Ala. 605, 127 So. 178 (1930) (price-fixing *per se* unlawful); Az. Rev. Stat. § 44-1402, *Three Phoenix Co. v. Pace*

Industries, Inc., 135 Ariz. 113, 659 P.2d 1258 (1983) (state courts to apply federal conduct standards); Minn. Stat. § 325D.53, subd. 1(1)(a) & (b) (price-fixing *per se* unlawful).

The only real difference between the state antitrust laws at issue in this appeal and federal law is that these state laws extend a remedy to a class of undisputed victims of anticompetitive conduct which is condemned as felonious under state and federal law, even though these victims do not enjoy a remedy under federal law. Certainly there is no possibility that a defendant would be required to violate the law of one sovereign in order to comply with that of another. There is no showing that payment under Section 4 of the Clayton Act to direct purchasers and compensation to downstream purchasers would be "physically impossible". *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 257 (1984). As a consequence, states' antitrust remedies are valid. *Id.; Fisher v. City of Berkeley*, 475 U.S. 260 (1986); *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982).

B. State Law Remedies for Downstream Victims of Price Fixing Do Not Conflict with the Federal Enforcement Scheme.

The federal treble damages remedy is controlled by *Hanover Shoe* and *Illinois Brick*. In *Hanover Shoe*, this Court was confronted with a case in which a violator of the antitrust laws sought to foreclose civil liability by arguing that the direct purchaser had passed-on the whole of the anticompetitive overcharge to downstream purchasers. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). To forestall antitrust violators from "retain(ing) the fruits of their illegality", this Court

presumed that the plaintiff before the Court, a first purchaser, had been injured to the extent of the original overcharge. *id.* at 494. Nine years later in *Illinois Brick*, this Court dealt with claims by downstream purchasers injured by a price-fixing conspiracy in the cement block industry. While recognizing that foreclosure of any remedy under federal law for downstream victims of anti-competitive conduct conflicted with traditional congressional interests in compensating victims of such conduct, this Court determined that enforcement objectives were more efficiently served within the federal system "by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it." *Illinois Brick*, 431 U.S. at 746.

These decisions are explicitly grounded on this Court's jurisprudential concerns with *economical* enforcement under Section 4 of the Clayton Act. By mistaking the focused jurisprudential concerns of this Court for the broader enforcement, deterrence, and compensation objectives of Congress, the lower court mistakenly accorded preemptive effect to policies which do not have "clear and manifest" support in the legislative history of the federal antitrust laws. *Rice v. Santa Fe Elevator Co.*, 331 U.S. 218, 230 (1947).

The remedial provisions of states' antitrust laws do not impinge on the federal enforcement scheme construed by *Hanover Shoe* and *Illinois Brick*. Recovery under states' laws is determined by actual injury. Insofar as a recovery by a direct purchaser under federal law represents the portion of the overcharge it actually incurs, that

amount has not been passed-on to downstream purchasers, and is *not* duplicated in any award to a downstream purchaser under states' laws.

In this case, there is no possibility that settling defendants will pay more because their liability was fixed by settlement. Indeed, the law of appellant State of Minnesota requires that all steps necessary be taken "to avoid duplicative recovery against a defendant". Minn. Stat. § 325 D. 57 (1986).

As a practical matter, the asserted danger of duplication is typically more hypothetical than real *Crown Oil* 177 Cal. App. 3d at 613; *Union Carbide* 36 Cal. 3d at 24. However, even if by operation of state law price-fixers were required to pay more than their anticompetitive overcharge trebled, that does not invalidate the remedial provisions of states' antitrust laws. As this Court observed in a case involving a state court award of punitive damages 100 times greater than the potential federal penalty applicable to the same conduct:

> The United States, as amicus curiae, contends that the award of punitive damages in this case is preempted because it conflicts with the federal remedial scheme, noting that the NRC is authorized to impose civil penalties on licensees when federal standards have been violated. 42 U.S.C. § 2282 (1976 ed. and supp. V). However, the award of punitive damages in the present case does not conflict with that scheme. Paying both federal fines and state-imposed punitive damages for the same incident would not appear to be physically impossible. Nor does exposure to punitive damages frustrate any purpose of the federal remedial scheme. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 257 (1984).

Just as criminal penalties under Section 1 of the Sherman Act do not foreclose, nor indeed impinge upon, private actions in the federal system, damages recovered by federal "private attorneys general" should not foreclose actions based on states' laws. Even within the federal system, this Court determined only that "on balance" enforcement concerns overrode congressional policy favoring recoveries by injured parties, including downstream purchasers. *Illinois Brick*, 431 U.S. at 746. However, it is axiomatic in preemption cases that where, as here, Congress has not clearly manifested an intent to foreclose state law remedies, the existence of federal remedies does not preclude state remedies for victims of conduct made illegal by federal and state law. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984); *Colorado Anti-Discrimination Comm. v. Continental Airlines*, 372 U.S. 714 (1973); *California v. Zook*, 336 U.S. 725 (1949).

C. The Remedial Provisions of States' Laws Will Not Inject Complexity into Federal Antitrust Proceedings.

A critical concern of this Court in *Hanover Shoe* and *Illinois Brick* was a fear that the presumed complexity of making pass-on determinations would "seriously impair" the effectiveness of the federal private treble damages action as "an important weapon of antitrust enforcement." *Illinois Brick*, 431 U.S. at 745. Whatever merit these concerns have for foreclosing downstream purchaser remedies in the federal scheme,[11] remedial actions under these state laws will not necessarily inject complexity into federal antitrust actions. "(Q)uestions of whether

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11. *The Supreme Court: 1976 Term*, 91 Harv. L.R. 70, 229 (1977).

overcharges were passed on, essential to the indirect purchaser's (state law) claim, are irrelevant to, and thus not subject to inconsistent determination in, a suit on the direct purchaser's federal claim." *Union Carbide Corp. v. Superior Court,* 36 Cal.3d 15, 23 (1984). Actions on behalf of downstream victims of price-fixing grounded on states' laws simply do not touch upon "the federal scheme which only permits recovery by direct purchasers." *Crown Oil Corp. v. Superior Court,* 177 Cal. App.3d 604, 613 (1986), *app. dism. sub nom. Crown Oil Corp. v. Lapidus Pollution, Inc.,* 479 U.S. 879 (1986).

Only when pendent state law claims are included in a federal antitrust action would a federal court be asked to make the pass-on determinations contemplated by the remedial provisions of states' laws. However, federal courts entertain such pendent state law claims only at their own discretion. *United Mine Workers of Am. v. Gibbs,* 383 U.S. 715 (1966).

As this case demonstrates, the exercise by a federal court of its discretionary jurisdiction does not necessarily require a complicated pass-on determination or in fact any such determination. In this case, states' representatives have stated that there is no evidence that any direct purchaser has made a claim for any quantity of price-fixed cement subject to a claim by a downstream purchaser. Jt. App. 71. The claims of appellant State of Minnesota specifically exclude all potential overlapping claims. Jt. App. 79-80. If, upon further auditing, a handful of claims by the other appellant states are identified as overlapping

claims by direct purchasers, the economic analysis required to determine the scope of states' injuries is straightforward, assuming that such an analysis is not sidestepped by negotiation among the parties. Harris & Sullivan, *Passing On The Monopoly Overcharge: A Comprehensive Policy Analysis,* 128 U.Pa.L.R. 269, 335 (1979) (general contractors treat input costs as direct costs and pass them on in full in the overwhelming majority of cases); Schaefer, *Passing-On Theory In Antitrust Treble Damage Actions: An Economic and Legal Analysis,* 16 Wm. & Mary L.R. 883, 920-925 (1975) (increased cost of a vital component passed-on in full). Once this determination is made by the trial court or by an appointed special master, the trial court can either allocate the settlement on the basis of actual injury in cases of overlapping claims, or allocate the settlement by crediting the full overcharge to the direct purchaser claiming under federal law and the amount of actual injury to the downstream victim claiming under state law.

Whatever challenges pass-on analysis may present those challenges are borne by state courts unless a federal court chooses to adjudicate pendent state law claims. *United Mine Workers of Am. v. Gibbs,* 383 U.S. 715 (1966). Direct purchasers claiming under federal law are not necessary parties in state proceedings. *Union Carbide Corp. v. Superior Court.* 36 Cal.3d 15 (1984). Similarly, *res judicata* will not bar a subsequent claim in federal court because federal courts have exclusive jurisdiction over Clayton Act claims. *See* Restatement (2d) of Judgments § 26(c)(1), Illus. 2 (1982). Likewise, the doctrines of merger and bar would not preclude a subsequent action

for downstream injuries in state court after an action in federal court concerning direct purchases. *Id.* at § 25, Comm. (e) & § 26(c). As a consequence, this Court's jurisprudential concern about the impact of pass-on analysis on federal courts, assuming *arguendo* that this concern might have preemptive effect,[12] is not implicated by states' laws.

IV. THE REMEDIAL PROVISIONS OF STATES' LAWS ADVANCE IMPORTANT CONGRESSIONAL PURPOSES.

A. The Remedial Provisions of States' Laws Advance the Congressional Objective of Compensating Victims of Anticompetitive Conduct.

Section 4 of the Clayton Act is "comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practice by whomever they may be perpetrated." *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982), *quoting Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948). This section evinces Congress' intent to "protect the victims of the forbidden practices as well as the public." *Radovich v. National Football League*, 352 U.S. 445, 454 (1957).

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12. Jurisprudential concerns with complexity expressed in *Illinois Brick* have been considered insufficient bases for the preemption of state remedies for downstream victims of price-fixing in various independent, scholarly analyses of the potential preemptive effect of that decision. Note, *State Indirect Purchaser Statutes: The Preemptive Power Of Illinois Brick*, 62 Boston U.L.R. 1241, 1262 n. 138 (1982); Note, *Indirect Purchaser Suits Under State Antitrust Laws: A Detour Around The Illinois Brick Wall*, 34 Stanf. L.R. 203, 212 (1981).

While this Court has determined that compensation for downstream victims of anticompetitive conduct under federal law impedes the economical enforcement of federal conduct standards in federal proceedings, this Court has never suggested that compensation of victims of price-fixing was not and is not a major purpose of the Congress in enacting the federal antitrust laws. Mainstream economics and the decisions of this Court agree that downstream purchasers of price-fixed goods are injured in fact by such conduct. Schaefer, *Passing-On Theory In Antitrust Treble Damage Actions: An Economic and Legal Analysis*, 16 Wm. & Mary L.R. 883 (1975); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977). Certainly by extending a remedy to victims of unlawful conduct who have no remedy under federal law, states' laws advance Congress' "expansive remedial purpose" in enacting the federal antitrust laws. *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982). Just as certainly, justice for downstream victims of price-fixing under states' laws is achieved without frustrating the enforcement system created by *Hanover Shoe* and *Illinois Brick*. *See* § III, *supra*.

B. States' Downstream Purchaser Remedies Advance Congressional Goals of Enforcement and Deterrence.

Reliance on direct purchasers to enforce the antitrust laws has been questioned by courts and scholars. Among other constraints, direct purchasers may be dependent on their suppliers and fearful of retaliation, while others may be unwilling to jeopardize longstanding profitable relationships. Wheeler, *Antitrust Treble Damage Actions: Do They Work?*, 61 Cal.L.R. 1319, 1331-1332 & nn. 56-57 (1973); Comment, *Antitrust Enforcement By Private Par-*

ties: Analysis of Developments In The Treble Damage Suit, 61 Yale L.J., 1010, 1057 & nn. 309-310 (1952); *see also* Panel Discussion, *Private Actions—The Purposes Sought and The Results Achieved,* 43 Antitrust L.J. 73, 87-96 (1973) (remarks of Mr. Bohon). Courts have also found direct purchasers less than aggressive representatives of the public interest. *See, e.g., In re Liquid Asphalt Cases,* 487 F.2d 191, 198 (9th Cir. 1973) *cert. denied* 415 U.S. 919 (1974); *State of W. Va. v. Chas. W. Pfizer & Co.,* 440 F.2d 1079 (2d Cir.) *cert. denied* 404 U.S. 871 (1971). This is not the only threat to enforcement and deterrence goals. Direct purchasers may settle for far less than a full recovery when they do sue because they were able to pass on the overcharge in the first place. Schaefer, *Passing-On Theory In Antitrust Treble Damage Actions: An Economic And Legal Analysis,* 16 Wm. & Mary L.R. 883, 915 n. 122 (1975).[13] Indeed, one study examining antitrust filings back to 1960 but before this Court's decision in *Illinois Brick* found that downstream purchasers were plaintiffs in almost two-thirds of all federal antitrust actions and the only plaintiffs in approximately 25% of all cases. S.Rep. No. 96-239, 96th Cong., 1st Sess. 16 (1979).

As this case demonstrates, downstream purchasers, particularly when represented by state attorneys general,

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13. The anti-competitive overcharge trebled is typically less than the cost of the conspiracy to the economy and less than the value of the unlawful conduct to the price-fixer. Parker, *Treble Damage Action-A Financial Deterrent To Antitrust Violations,* 16 Antitrust Bull. 483, 486-492 (1973); Erickson, *The Profitability Of Violating The Antitrust laws: Dissolution And Treble Damages In Private Antitrust Litigation,* 5 Antitrust L. & Econ. Rev. 101 (Spr.1972). As a consequence, the federal treble damage remedy significantly under-deters price-fixing. *Id.*

can efficiently and effectively enforce the conduct standards of federal and state antitrust law. Downstream purchaser actions can only advance congressional interests in enforcement of prohibitions against anticompetitive conduct. To preclude downstream purchasers from seeking remedies for the injuries they have in fact sustained would significantly diminish the overall national effort to keep the American economy free of price-fixing. It would also eviscerate the deterrence value of state antitrust law. Not only would this be a devastating blow to antitrust enforcement generally, it would also strike at the heart of the state-federal partnership which has been the foundation of national antitrust policy since 1890.

V. THE DOWNSTREAM PURCHASER REMEDIES OF STATES' LAWS PROPERLY SUPPLEMENT FEDERAL ANTITRUST LAW.

An important aspect of state sovereignty is the power to supplement the remedial and penalty provisions of federal law. It has long been established that: "'the same act might, as to its character and tendencies, and the consequences it involved, constitute an offense against both the State and Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each.'" *California v. Zook,* 336 U.S. 725, 731 (1949) *quoting United States v. Marigold,* 50 U.S. 560, 569 (1850). This Court has consistently upheld state penalties or remedies designed to protect a state's citizens from conduct made unlawful under both federal and state law. *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238 (1984)[1]; *Colorado Anti-Discrimination Comm'n v. Continental Airlines,* 372 U.S. 714 (1963); *California v. Zook,* 336 U.S. at 725.

This principle of federalism extends to the imposition of *criminal* penalties by separate sovereigns in the federal system. This Court has held that federal and state penalties may be lawfully imposed on a lawbreaker for the same act. *Bartkus v. Illinois,* 359 U.S. 187 (1959); *Abbate v. United States,* 359 U.S. 121 (1959). This Court has also recently held that sequential penalties may be imposed by an Indian tribe and the federal government, or by two states. *United States v. Wheeler,* 435 U.S. 313 (1978); *Heath v. Alabama,* 474 U.S. 82 (1985) (two states lawfully imposed different penalties for the same murder, one state sentencing the defendant to death). *A fortiori,* states' civil remedies which are precisely tailored to the effect of unlawful conduct on the enacting state and its citizens are lawful. *Cf. New York v. Henderson Bros., Inc.,* 840 F.2d 1065, 1086 (2d Cir. 1988) (recoveries under Section 4 of the Clayton Act do not foreclose imposition of civil penalties under state antitrust law).

CONCLUSION

The downstream purchaser provisions of states' laws are an exercise of traditional state police power to provide comprehensive protection for states and their citizens from antitrust violations irrespective of the location of victims in the chain of distribution. Congress has made plain in the text of its statutes and in its debates that such remedies are a positive good. Congress has also consistently supported state antitrust law as a key element in the state-federal enforcement partnership first struck in 1890 and repeatedly renewed in this century. Insofar as

congressional intent is the measure, the remedial provisions of states' laws are certainly valid.

States' laws do not create any actual conflict with federal antitrust law. Neither do states' laws conflict with the federal system of privately enforced penalties created by this Court's decisions in *Hanover Shoe* and *Illinois Brick.* Nor do they inject complexity into federal proceedings.

In fact, the remedial provisions of states' laws advance congressional policy of compensation for victims of anticompetitive conduct. States' laws advance congressional policies of vigorous enforcement of the antitrust laws and deterrence of future violations. States' remedies properly supplement the remedies and penalties of federal law.

The downstream purchaser provisions of states' laws are wholly consistent with the purposes and goals of Congress. By ignoring the legislative record of the federal antitrust laws, the decision of the lower court affronts the federalism jurisprudence of this Court, and indeed represents a fundamental assault on the structure of the federal system.

For the foregoing reasons, the States of Alabama, Arizona, California, and Minnesota respectfully request that the decision below of the Ninth Circuit be reversed.

DATED: November 30, 1988

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APPENDIX A

THE ANTITRUST BILL INTRODUCED BY SENATOR SHERMAN, DECEMBER 4, 1889

(S. 1, 51st Cong., 1st Sess.)

A BILL

To declare unlawful trusts and combinations in restraint of trade and production.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view, or which tend, to prevent full and free competition in the importation, transportation, or sale of articles imported into the United States or in the production, manufacture, or sale of articles of domestic growth or production, or domestic raw material that competes with any similar article upon which a duty is levied by the United States, or which shall be transported from one State or Territory to another, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend, to advance the cost to the consumer of any of such articles, are hereby declared to be against public policy, unlawful, and void.

Sec. 2. That any person or corporation injured or damnified by such arrangement, contract, agreement, trust, or combination may sue for and recover in any court of the United States of competent jurisdiction of any person or corporation a party to a combination described in the first section of this Act the full consideration or sum paid by him for any goods, wares, and merchandise included in or advanced in price by said combination.

Sec. 3. That all persons entering into any such arrangement, contract, agreement, trust, or combination described in section one of this Act, either on his own account or as agent or attorney for another, or as an officer, agent, or stockholder of any corporation, or as a trustee, committee, or in any capacity whatever, shall be guilty of a high misdemeanor, and, on conviction thereof in any district or circuit court of the United States, shall be subject to a fine of not more than ten thousand dollars, or to imprisonment in the penitentiary for a term of not more than five years, or to both such fines and imprisonment, in the discretion of the court. And it shall be the duty of the district attorney of the United States of the district in which such persons reside to institute the proper proceedings to enforce the provisions of this Act.

APPENDIX B

SHERMAN ANTITRUST ACT[1]

An Act To protect trade and commerce against unlawful restraints and monopolies

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the Dis-

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[1] Act of July 2, 1890, 26 U.S. Stat. 209, 51st Cong., 1st Sess.

trict of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories any any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

Sec. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause

them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshall thereof.

Sec. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

Sec. 8. That the word "person" or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

APPELLEE'S

BRIEF

No. 87-1862

(10)

DEC 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

STATE OF CALIFORNIA, et al.,

Appellants,

vs.

ARC AMERICA CORPORATON, et al.,

Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

BRIEF OF APPELLEES/CLASS MEMBERS ALLIED CONCRETE, INC., *et al.*

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QUESTIONS PRESENTED FOR REVIEW

The twelve class members filing this brief believe that the primary issue presented in this appeal is far narrower than the appellant states' formulation:

Whether, in the allocation of a class-action settlement fund representing only a fraction of the damages suffered by the direct purchasers for price-fixing under the federal antitrust laws, the district court is required to divert a portion of the fund to indirect purchasers claiming under state laws.

(A separate issue, if the Court determines that state indirect purchaser laws are not pre-empted in the circumstances of this case, is whether Arizona's state antitrust act permits the state to recover damages for indirect purchases. This point is addressed in appellee ARC America's brief.)

PARTIES TO THE PROCEEDING BELOW

In addition to the named plaintiffs and defendants and the class members who have entered appearances, *all* members of the plaintiff class are deemed to be parties in this action for purposes of 28 U.S.C. § 455(b)(4). *In re Cement and Concrete Antitrust Litigation*, 688 F.2d 1297 (9th Cir. 1982), *aff'd for lack of quorum* 459 U.S. 1190 (1983).

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STATEMENT OF THE CASE

The pre-emption question in this matter is closely linked with the procedural history and current posture of the case. This litigation is nearly 13 years old. The first suit was filed by a private plaintiff, Arizona Slump Block Co., in July 1976. D.Ariz.Civ. 76-485, Docket Entry 1. Some 34 more suits followed, most of them brought by private plaintiffs. There were 46 named plaintiffs. In addition, 31 members of the plaintiff class entered appearances under *Fed.R.Civ.P.* 23(c)(2)(C). The clerk's docket sheets alone run nearly 500 single-spaced typewritten pages. Excerpt of Clerk's Record, Ninth Circuit No. 84-2865, vol. III.

The plaintiffs in the actions below sued 61 cement companies. They settled with seven of them for $31 million. Then the district court decertified the class.

That left the settlement fund. According to plaintiffs' co-lead counsel, the defendants who settled represented 17% of the total, and they were given a "discount" for settling early. This indicates that counsel for the named plaintiffs (including the four states which are now appellants) and class representatives believed the suit was worth $200 million or more. *See* Statement of Arizona Ready-Mix Companies Concerning Consolidated Application for Award of Fees, Nov. 1, 1984, Page 3, MDL 296 Docket Entry 3715.

One-third of the settlement fund was distributed to the named plaintiffs and class representatives for attorneys' fees and costs, leaving something over $20 million of the settlement (plus accruing interest) for distribution to the victims of the price fix. Obviously, this represents a

small fraction of the total harm the plaintiffs' counsel thought they could prove.

When it came time to divide the settlement fund among the claimants, the district court was faced with numerous choices. It could allocate the fund only to those who had bought their cement from the settling defendants, leaving customers of the non-settling defendants free to pursue individual suits against their suppliers. It could allocate equally to all purchasers from settling or non-settling producers. Or it could work out some middle position giving different "weight" to settling or non-settling defendant sales. It could allow claims based upon refusals to deal, or state civil penalty statutes, or could conclude that this was principally a price fixing case and that such recoveries would dilute the recovery for the victims of the price fix. All of these issues, and many others, were within the broad discretion given to trial courts in dividing up class action settlement funds. *In re Equity Funding Corp. of America Securities Litigation*, 603 F.2d 1353 (9th Cir. 1979).

One of the issues confronting the district court was whether to allot any of the settlement fund to indirect purchaser claims under state antitrust laws. The judge decided not to. As a matter of discretion, his conclusion would clearly be upheld on appeal. It would be within the court's indisputable discretion to limit to direct purchasers a recovery fund which is not sufficient to compensate fully all direct purchasers, where the indirect purchaser states remain free to pursue their state law claims against the 54 non-settling defendants. A district

judge could reasonably find that this was the most efficacious way to advance the purposes of the federal antitrust laws, as enunciated in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The district court was dividing a fixed fund that represented merely a partial settlement with only a handful of the defendants. It was insufficient to make even the direct purchasers whole.[1]

Judge Real recognized that anything awarded to the indirect purchasers would come, not from the defendants, but from the direct purchasers. He rightly concluded that this would go directly counter to the Congressional purpose of encouraging treble damage suits by antitrust victims. Thus he held that in the circumstances of this case, the use of the state law to divert part of the limited recovery to indirect purchasers interfered with Clayton Act § 4, and was therefore pre-empted. The Court of Appeals for the Ninth Circuit concurred. *In re Cement and Concrete Antitrust Litigation*, 817 F.2d 1435, 1444-1447 (9th Cir. 1987).

SUMMARY OF ARGUMENT

The appellant states are claiming a legal right to a share of the settlement fund proportional to their actual

[1] This case is significantly different from, *In re Chicken Antitrust Litigation*, 585 F.2d 228 (5th Cir. 1982), in which the direct and indirect purchasers had agreed among themselves, at the time of settlement, to a specific division of the proceeds.

damages. Unlike an equitable allocation of the sort performed by the district court below, this would require an adversary determination of the actual damages suffered by each direct purchaser claimant and, with respect to state indirect purchasers, the portion of the overcharge "passed on" by the direct purchasers and any other intervening purchasers. Since the present dispute is over division of a fixed settlement fund that represents only a small fraction of the damages sustained, both the state recovery and the expenses of litigating division of the fund would come from proceeds otherwise recoverable by the direct purchasers. This would directly undermine the effectiveness of the private action under Clayton Act § 4, and is therefore pre-empted.

ARGUMENT

We fully endorse the arguments set forth in Appellee ARC America's Answering Brief, and do not propose to duplicate that effort. Instead this Brief will focus upon one particular aspect of this appeal:

Indirect purchaser sharing in the settlement fund would require a new, incredibly complex and expensive round of litigation.

The appellants blithely skip over the immense practical difficulties their position would present. Brief of Appellants at 36-37. In the present appeal, the issue is not whether state antitrust claims "will . . . necessarily inject complexity into federal antitrust claims," Brief of Appellants at 35, but whether they will do so *in this case*. As noted above, the states do not base their claim upon the

general discretionary power of the district court to allocate the fund. Rather, they insist that they have an absolute *right* to a share of the fund in proportion to their actual damages.

Consider, then, what would be required in order to vindicate this "right":

First, the district court would have to determine the *actual damages* suffered by each direct purchaser. The assumption made in the direct purchaser claims processing – that all direct purchasers were victimized equally – may be good enough for an equitable allocation, but it would not suffice for a determination of actual damages. The nature of cement means that there is no single, national market for which a price norm could be derived. The preponderance of localized market factors was a principal basis on which the defendants were able to get the class decertified in 1984. See Defendants' Memorandum in Support of their Motion to Decertify the Plaintiff Classes, Nov. 25, 1983, Pages 13-24, MDL 296 Docket Entry 2462. Instead, there would have to be a manufacturer-by-manufacturer, year-by-year determination of what a "real" competitive price would have been, and a comparison of actual transaction prices with those theoretical prices. *Id.*; see also Defendants' Reply Memorandum in Support of their Motion to Decertify the Plaintiff Classes, Dec. 12, 1983, Pages 21-34, MDL 296 Docket Entry 2553; and Dundee Cement Company's Supplemental Reply Memorandum in Support of Defendants' Motion to Decertify the Plaintiff Classes, Dec. 12, 1983, MDL 296 Docket Entry 2601.

Second, there would have to be a full "pass-on" trial to determine how much of the cement overcharge was passed-on by the direct purchasers who produced cement-containing products (such as ready-mix concrete, pipe or block) that went into each state project.[2] The cost structure and local market conditions of each and every such producer would have to be analyzed to determine (a) how much they actually charged, (b) how much they actually paid for the cement used to fill each particular order, (c) how much they would have had to pay for that cement had there been no price-fix, and (d) what their charge for their cement-containing products would have been had their been no price-fix. Only thus could the actual amount of the direct purchaser's pass-on be calculated.

Third, in those cases where the ready-mix, block or other product was sold to a contractor (or subcontractor) for inclusion in a state project, there would have to be a second "pass-on" trial to determine how much of the ready-mix producer's pass-on was then passed-on by the contractor to the plaintiff state. All of

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[2] The suggestion that no "pass-on" trial would be required where the intermediate purchaser has not filed a claim (Brief of Appellants at 36-37) is erroneous. The states cannot claim as damages more than their actual injury, which is the amount of the overcharge passed through to them. There is no basis in common sense or economic theory to presume a 100% pass-through when a price-fixed product is incorporated in another product, containing other ingredients. *Cf. In re Sugar Industry Antitrust Litigation*, 579 F.2d 13, 17 (3d Cir. 1978). Permitting the states to claim the full overcharge would dilute the direct purchasers *twice* – once for the states' own damages, and again for the damages absorbed by their suppliers.

the local-market competitive analysis described above would have to be performed again.

Only after all these steps could the actual damages suffered by the direct purchasers and the states be totaled, and the settlement fund be distributed in proportion to the claimants' actual damages.

Consider, too, the likelihood that such a process could produce a result in which anyone could have confidence. There is, to begin with, the inherent uncertainty of economic theorization in the real world of imperfect, human activity. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 741-744 (1977). Compound that uncertainty by the obstacles to obtaining reliable baseline data. The claims cover the years 1968 to 1976. Even at the national level, the amount of cement overcharges was never litigated. To our knowledge, there has never even been any discovery regarding local market conditions and cost inputs for ready-mix producers and contractors. What is the likelihood that any appreciable number of them have retained records of such matters for 21 years?

Finally, consider the cost of litigating all these matters. That it would require an immense amount of work is self-evident. Who will pay for it? The states, of course, have civil servants in their attorneys-general's offices. The direct purchasers, however, require private counsel. The settlement fund has already been reduced by one-third to pay for attorneys. The Court will note that none of the class representatives or their counsel have stepped forward to defend the integrity of the settlement fund in this appeal. Further litigation would require payment of private counsel either by individual class-members or by

the class as a whole under the "common-fund" rule. Either way, the net recovery by direct purchasers will be further depleted. This is the very evil this Court warned against in *Illinois Brick*:

> "[W]e question the extent to which such an attempt would make individual victims whole for actual injuries suffered rather than simply depleting the overall recovery in litigation over pass-on issues. . . . And given the difficulty of ascertaining the amount absorbed by any particular indirect purchaser, there is little basis for believing that the amount of the recovery would reflect the actual injury suffered."

431 U.S. at 747.

CONCLUSION

In this case, any award of settlement proceeds to the appellants can come from only one source: the direct purchasers, whose share of the partial settlement will be substantially reduced. The expense of determining the share of the fund to which the states lay claim would be considerable, and must also come from the pockets of the direct purchasers. When a state law does such violence to a right arising from federal law, the supremacy clause compels that the state law must yield.

Accordingly, class members/appellees Allied Concrete, Inc., *et al.*, respectfully urge this Court to affirm the decision of the Ninth Circuit.

Respectfully submitted on December 23, 1988.

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APPELLEE'S

BRIEF

QUESTION PRESENTED

This Court determined in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), that recovery under federal law of antitrust damages by parties other than direct purchasers would substantially reduce and seriously impair the effectiveness of the private treble damage remedy created by Section 4 of the Clayton Act, 15 U.S.C. § 15. The question presented by this case is whether *state* laws that authorize indirect purchaser recoveries also stand as an obstacle to the accomplishment and execution of the Clayton Act treble damage remedy and are therefore preempted under the Supremacy Clause of the United States Constitution.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1862

STATE OF CALIFORNIA, *et al.*,

Appellants,

v.

ARC AMERICA CORPORATION, *et al.*,

Appellees.

On Appeal From The United States Court of Appeals For The Ninth Circuit

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BRIEF OF APPELLEE ARC AMERICA CORPORATION

STATEMENT OF THE CASE

Purchasers of cement and cement-containing products, including appellee ARC America Corporation ("ARC America"), have engaged in coordinated litigation in the United States District Court for the District of Arizona, MDL Docket No. 296-PHX-MLR, seeking recovery of treble damages under § 4 of the Clayton Act, 15 U.S.C. § 15, for price-fixing in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. On April 1, 1977, plaintiffs filed their initial motion for class certification, requesting the district court to certify five nationwide classes and one statewide class of purchaser plaintiffs. Memorandum in Support of Plaintiffs' Amended Motion For Class Certification ("Class

Certification Memorandum"), Joint Appendix ("J.A."), 38. The classes initially proposed by plaintiffs were organized along distribution levels in the cement industry, including manufacturers, resellers, subcontractors, general contractors and owner-builders. *Id.*

On June 9, 1977, this Court decided *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), which held that, with limited, specified exceptions, indirect purchasers could not recover damages for violations of the federal antitrust laws. To avoid the problems thereby created by having classes designated in accordance with distribution levels, plaintiffs temporarily withdrew their motions for class certification, Class Certification Memorandum, J.A., 39, and filed an amended motion for class certification establishing classes that did not, on their face, conflict with this Court's decision in *Illinois Brick*. *Id.*, J.A., 33-41. On March 9, 1979, the district court granted plaintiffs' amended motion for class certification. *In re Cement and Concrete Antitrust Litigation*, 1979-1 Trade Cas. (CCH) ¶ 62,502 (D. Ariz. 1979).

Between July 31, 1979 and October 23, 1981, seven defendants entered into settlements with plaintiffs whereby payments aggregating over $32 million were paid into a fund to be allocated among plaintiff classmembers. *In re Cement and Concrete Antitrust Litigation*, 817 F.2d 1435, 1438 (9th Cir. 1987), *pet. for reh'g and sug. for reh'g en banc denied*, No. 84-2865, (9th Cir. Feb. 9, 1988). Jurisdictional Statement ("Juris. Stat."), App. A. Commencing in 1984, the district court sought to create a plan to distribute the settlement fund among the claimants. 817 F.2d at 1438. Juris. Stat. App., A-4. From May, 1984 through January, 1985, numerous briefs were filed with the district court suggesting various methods for allocating the settlement fund and setting out legal arguments addressed to whether indirect purchasers were entitled to share in the fund.

The district court held hearings concerning the various proposals for distribution of the settlement fund. At one such hearing, counsel for California acknowledged that a decision permitting indirect purchasers to share in the settlement fund would require a pass-on trial, J.A., 77-79, would dilute the recovery of direct purchasers under their federal claims, *id.*, and would authorize overlapping claims against the settlement fund for the same anticompetitive overcharge, J.A., 71-73.

On January 25, 1985, the district court entered Pre-Trial Order No. 122, which disallowed any indirect purchaser recovery except that which could be demonstrated to fit within one of the enumerated exceptions in *Illinois Brick*. Juris. Stat. App., A-27. The district court stated, in pertinent part:

> Claims will not be allowed for indirect purchases of cement or cement-containing products unless such claims fall within one of the presently recognized exceptions to the rule enunciated by the Supreme Court in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977). The indirect purchaser claims advanced . . . pursuant to . . . state statutes which purport to authorize recovery for indirect purchases are disallowed. Such statutes are clear attempts to frustrate the purposes and objectives of Congress, as interpreted by the Supreme Court in *Illinois Brick*, and, accordingly, *are preempted by federal law.*

Juris. Stat. App., A-30 to A-31 (emphasis in original).

The Ninth Circuit affirmed the district court's decision. After examining this Court's decisions in *Illinois Brick* and *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), the Ninth Circuit held that "the state law claims in this case based on indirect purchases of cement that do not fall within any exception to the rule of *Illinois Brick* are preempted because they stand 'as an

obstacle to the accomplishment of the full purposes and objectives' of federal antitrust law." 817 F.2d at 1447, Juris. Stat. App., A-25.

Appellee ARC America Corporation was a direct purchaser of cement from the settling defendants, and was a member of one of the designated classes entitled to a share of the settlement fund. Alabama, Arizona, California and Minnesota ("appellants") seek to reach into the settlement fund to recover damages as indirect purchasers of cement and cement-containing products. They have appealed from the decisions below denying indirect purchasers a share of the settlement fund.

SUMMARY OF ARGUMENT

This Court has determined "that the effectiveness of the antitrust treble-damages action would be substantially reduced by adopting a rule that any party in the chain [of manufacture or distribution] may sue to recover the fraction of the overcharge allegedly absorbed by it." *Illinois Brick Co.* v. *Illinois*, 431 U.S. at 729.[1] Appellants have adopted precisely such rules. Because state laws that stand "as an obstacle to the accomplishment and execution" of federal laws are preempted by the Supremacy Clause of the United States Constitution, *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941), appellants must demonstrate that their indirect purchaser laws do not have the seriously disruptive effect on federal antitrust treble damage actions that this Court has already found with respect to federal indirect purchaser actions. Unless appellants are able to make such a showing, the judgment below must be affirmed.

[1] The Court in *Illinois Brick* delineated two principal exceptions to the prohibition against indirect purchaser damage suits. These limited exceptions to the *Illinois Brick* rule are not relevant in this proceeding, since the district court's fund allocation decision expressly allowed claims by indirect purchasers who could demonstrate that they fit within such exceptions. Juris. Stat. App., A-30 to A-31.

In *Illinois Brick*, this Court carefully examined the impact on the Clayton Act of indirect purchaser actions. The Court reviewed the purposes underlying the federal antitrust laws and the practical effect on those objectives of expanding the private treble damage remedy to allow actions by indirect purchasers. The Court found that including indirect purchasers in the private action remedial scheme would seriously undermine the treble damage remedy that is a centerpiece of the federal antitrust laws.

The *Illinois Brick* Court found that indirect purchaser actions would impose three separate, individually intolerable burdens on the effectiveness of private treble damage actions under the Clayton Act. First, indirect purchaser actions would inevitably entail massive complications, delays and prohibitive costs that would weaken enforcement of the antitrust laws by "private attorneys general." 431 U.S. at 737-44. Second, indirect purchaser claims would necessarily dilute the potential for recoveries by direct purchasers, and thereby defeat the fundamental purpose of § 4 of the Clayton Act to encourage private enforcement of federal antitrust laws. *Id.* at 745-47. Third, actions by indirect purchasers would inject an unacceptable risk of multiple, duplicative and overlapping recoveries for the same overcharge, upsetting the carefully balanced scheme enacted by Congress for the enforcement of the antitrust laws. *Id.* at 730-31 & n.11.

State indirect purchaser claims give rise to these same obstacles to the efficient and effective implementation of the federal antitrust laws. They inject the same complexities into private enforcement actions involving federal antitrust claims, they dilute the value of private enforcement actions by direct purchasers, and they exacerbate the risk of multiple recovery for the same overcharge, a consequence that this Court has so often held to be unacceptable in antitrust cases.

Appellants' only response to the variety of complications, inequities and disabilities that their indirect purchaser claims will visit on federal treble damage actions is to suggest that federal courts decline to entertain pendent state law indirect purchaser claims. However, this facile solution cannot withstand scrutiny for several reasons. First, the complexities, redundancies and injustices caused by indirect purchaser claims will not vanish by banishing them to a separate venue. It would be difficult to construct a more inefficient, awkward and trouble-prone vehicle than tandem antitrust litigations.

Second, pendent jurisdiction is a matter of federal judicial power and discretion, neither of which are subject to the control of the States. Under current law, federal district courts are likely to conclude, in individual cases, that "considerations of judicial economy, convenience and fairness to litigants," *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966), require the exercise of pendent jurisdiction despite the potential difficulties created by combining state and federal antitrust damage actions. This is *especially* true in the antitrust context, where a common nucleus of operative facts, *e.g.* a price fixing conspiracy, can give rise to a host of federal and state claims involving large numbers of geographically dispersed parties. Indeed, as observed by the Court in *Illinois Brick* and as acknowledged in this case by appellants' amici, cases in which state and federal treble damage actions are predicated upon the same conduct are paradigmatic occasions for consolidating rather than dispersing related claims. *Illinois Brick*, 431 U.S. at 737 n.18; Brief of Amici National Conference of State Legislatures, *et. al.*, at 13-14 n.8. Appellants cite no persuasive authority for the proposition that the legislatures of the several states may, by enacting legislation, constrain the power and discretion of federal courts to exercise pendent jurisdiction.

Finally, appellants' confident but unanalyzed assertion that the problems foreseen by *Illinois Brick* will disappear

if federal courts just say no to pendent state law claims fails to recognize that state indirect purchaser claimants frequently will come to the federal district courts under the non-discretionary diversity jurisdiction of those courts.

The same parties who opposed the result in *Illinois Brick* are attempting to find a way around that case. However, their state law alternatives to the federal indirect purchaser recoveries rejected in *Illinois Brick* present the same insurmountable burdens and destructive influences on private treble damage actions under § 4 of the Clayton Act as the remedies these statutes were enacted to replace. *Illinois Brick* requires affirmance of the decision below.

ARGUMENT

I. STATE STATUTES ARE PREEMPTED BY FEDERAL LAW WHEN THEY STAND AS AN OBSTACLE TO THE ACCOMPLISHMENT AND EXECUTION OF THE FULL PURPOSES AND OBJECTIVES OF CONGRESS

In *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819), Chief Justice Marshall explained that pursuant to the Supremacy Clause of Article VI of the Constitution, "the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." Preemption occurs whether or not a State labels its actions as "traditional" or as part of its police powers. *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824) ("In every such case, the act of congress, or the treaty, is supreme; and the law of the state, *though enacted in the exercise of powers not controverted*, must yield to it")(emphasis added).[2]

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[2] *See also Fidelity Fed. Sav. & Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141, 153 (1982) (the perceived importance to the State of its own

In recognition of these principles, this Court, in *Hines* v. *Davidowitz*, 312 U.S. 52 (1941), articulated the preemption test applicable where Congress has neither expressly preempted state laws nor enacted legislation that renders compliance with both state and federal law impossible. That test is whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 312 U.S. at 67. *See also CTS Corp.* v. *Dynamics Corp. of America*, 481 U.S. 69, ___, 107 S. Ct. 1637, 1644 (1987); *Lawrence County* v. *Lead-Deadwood School District*, 469 U.S. 256, 260 (1985) ("impeded the operation of the federal Act"); *Hayfield Northern Railroad Co., Inc.* v. *Chicago & North Western Transportation Co.*, 467 U.S. 622, 634 (1984); *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984); *Edgar* v. *Mite Corp.*, 457 U.S. 624, 632 (1982) (plurality opinion) ("frustrates the objectives of the [federal law] in some substantial way").

Preemption of concurrent state regulation does not require explicit congressional expression of an intent to displace state law or to create federal exclusivity. Instead, preemption of state law "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977). *See also Fidelity Federal Savings & Loan Association* v. *De La Cuesta*, 458 U.S. 141, 153 (1982). Thus, in determining whether state law impedes, frustrates, or imposes barriers to the intended goals or operations of a federal statute, the Court, as held in *Jones* v. *Rath Packing*, must "consider the relationship between state and federal laws as

law is immaterial when that state law conflicts with federal law); *Perez* v. *Campbell*, 402 U.S. 637, 651-52 (1971) (if the effect of a state law is to frustrate the purpose of a federal scheme, the legitimacy of a State's purpose in passing the law is irrelevant).

they are interpreted and applied, not merely as they are written." 430 U.S. at 526.[3]

Applying this preemption analysis, the federal courts have invalidated portions of state antitrust statutes and analogous economic regulations that conflict with federal antitrust laws. For example, the Court has recognized that, because major league baseball's reserve system is immunized from the application of federal antitrust law, conflicting state antitrust regulation of the activities of organized baseball is preempted. *Flood* v. *Kuhn*, 407 U.S. 258, 284-85 (1972) (adopting district court's finding of preemption). Similarly, in rejecting the application of a state doctrine of estoppel to foreclose a federal antitrust challenge to a licensing agreement, this Court has held that conflicting state law and policy must yield to the overriding federal policy. *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173, 176 (1942). *See also Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 139 (1968), *rev'd on other grounds, Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984) ("we cannot accept the Court of Appeals' idea that courts have power to undermine the antitrust acts" by permitting the assertion of a state common law defense).[4]

Appellants' and amici's repeated talismanic incantation of state "police power" (Brief of Appellant States at 13-14; Brief of Amicus United States at 7-9; Brief of Amici Thirty-Five States, *et al.*, at 30-34; Brief of Amici National

[3] "Pre-emption may be either express or implied." *Fidelity Fed. Sav. & Loan Ass'n* v. *De La Cuesta*, 458 U.S. at 152-53. Moreover, the benefits of the federal law may not be denied by the state law. *Sola Elec. Co.* v. *Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942).

[4] *See also Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225, 231 (1964), and *Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964) (state unfair trade practice law preempted because State is not permitted, under its law, to "give protection of a kind that clashes with the objectives of the federal patent laws").

Conference of State Legislatures, *et al.*, at 5-6) contributes nothing to the ultimate resolution of the preemption question because, in the context of the Supremacy Clause, a State's police power cannot, by definition, be construed more broadly than whatever reserved power it has to operate in a manner that does not conflict with federal law. Although the States possess broad latitude to enact laws and to exercise their "traditional police powers," these laws are preempted to the extent that they represent an impediment to the effective enforcement of the federal law.[5] The indirect purchaser provisions of appellants' antitrust laws do exactly that.

By allowing downstream purchasers to pursue damage claims under state law for conduct proscribed by the state and federal antitrust laws, appellants' statutes create the precise obstacles to federal antitrust enforcement that this Court found to exist with indirect purchaser recovery un-

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[5] Appellants and their amici contend that Congress never intended the Sherman or Clayton Acts to displace state antitrust law. Brief of Appellant States at 23-24. For example, they argue that the Sherman Act was intended to supplement, not dispossess, existing and future state antitrust regimes. *Id.* at 4. But appellee does not argue, nor did the Ninth Circuit hold, that the Sherman Act or Clayton Act displace or dispossess state antitrust enforcement regimes. To the contrary, appellee acknowledges that, except in cases of conflict, federal and state antitrust enforcement can, do and will continue to coexist. Neither appellee nor the Ninth Circuit proposes the preemption of state antitrust enforcement schemes, and appellants' suggestions to the contrary merely constitute attempts to exaggerate the impact on state law enforcement of a decision affirming the decision below. This case involves one narrow segment of state antitrust law, and challenges only the portion that is manifestly inconsistent and irreconcilable with federal law. If the court below is affirmed, the remainder of the appellants enforcement mechanisms will remain intact.

der federal law. For the same reasons that produced the decision in *Illinois Brick*, these statutes cannot survive.[6]

II. THIS COURT IN *ILLINOIS BRICK* CONCLUDED THAT CONGRESS' PRINCIPAL PURPOSE IN ENACTING § 4 OF THE CLAYTON ACT WAS NOT TO MAKE VICTIMS WHOLE BUT WAS TO ENCOURAGE PRIVATE ENFORCEMENT OF THE FEDERAL ANTITRUST LAWS

Appellee acknowledges that "in any preemption analysis, 'the purpose of Congress is the ultimate touchstone.' "

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[6] Certain amici, but not appellants, find support for appellants in this Court's state action immunity decisions commencing with *Parker* v. *Brown*, 317 U.S. 341 (1943). *See* Brief of Amicus United States at 13 n.9, 25; Brief of Amici Thirty-Five States, *et al.*, at 9, 35-36; Brief of Amici National Conference of State Legislatures, *et al.*, at 6-7, 11. The state action immunity doctrine, however, has nothing whatever to do with this case. State action immunity flows from this Court's recognition that the federal antitrust laws—and the purposes served thereby—were never intended to displace state power to remove certain activities from the competitive marketplace and place them under regulatory control. *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 57 (1985).

While principles of federalism motivated this construction of congressional intent, the state action immunity test was crafted to "prevent[] the State from frustrating the national policy in favor of competition by casting a 'gauzy cloak of state involvement' over what is essentially private anticompetitive conduct." *Id.*, quoting *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980). Thus, even under the highly deferential state action doctrine, the test for satisfying its requirements are specifically aimed at preventing the states from using regulation as a subterfuge for thwarting federal antitrust policy.

This case does not involve any State's effort to regulate the cement industry by removing pricing practices from the competitive marketplace. Rather, it involves the decision by certain States that their method of *promoting* competitive conduct is superior to that created by the federal antitrust laws and should operate regardless of any impairment to what the states perceive to be a less effective federal scheme. *See, e.g., Crown Oil Corp.* v. *Superior Court*, 177 Cal. App. 3d 604, 223 Cal. Rptr. 164 (1986), *reh'g denied*, 177 Cal. App. 3d 614 (Cal. 1986),

Fort Halifax Packing Co. v. *Coyne*, 482 U.S. 1, ___, 107 S. Ct. 2211, 2216 (1987). A principal issue before this Court thus revolves around Congress' goals in enacting the Sherman and Clayton Acts. Appellants make two fundamental errors in attempting to identify and define these goals. First, appellants mistake Congress' principal goal by arguing that the primary motive underlying the Sherman and Clayton Acts was the compensation of victims of price fixing. Brief of Appellant States at 20-29. As enunciated by this Court, Congress' goal in enacting the Sherman and Clayton Acts was considerably broader: to attack anticompetitive conduct by establishing a carefully balanced package of government and private enforcement and remedial mechanisms. Appellants have confused this goal with one of the *means* chosen by Congress to achieve the goal, *i.e.*, treble damages for certain victims of anticompetitive conduct.

Appellants' second error results from their understandable desire to put distance between their indirect purchaser laws and this Court's meticulous assessment in *Illinois Brick* of the damaging effect of indirect purchaser actions on the Clayton Act's treble damage remedy. Appellants therefore dismiss the Court's *Illinois Brick* analysis as little more than parochial concern for judicial economy and brush aside as spurious the Court's interpretation in *Illinois Brick* of Congress' intent in enacting the Clayton Act. *See* Brief of Appellant States at 9 (a "proxy for

appeal dismissed sub nom. Crown Oil Corp. v. *Lapidus Popcorn, Inc.*, 479 U.S. 879 (1986), where the California Court of Appeal based its decision that California's indirect purchaser statute is not preempted by federal antitrust law in part on its view and that of the state legislature that the conclusions of this Court in *Illinois Brick* were wrong. 177 Cal. App. 3d at 612 ("we agree, as did our state's Legislature, with Justice Brennan's observation that it is the *Illinois Brick* majority decision which frustrates Congress' purpose in creating the treble-damages action"). This is not the type of state action, *i.e.* a state's determination to overrule federal law as defined by this Court, that *Parker* v. *Brown* and its progeny sought to protect.

congressional intent"). Appellants also conveniently overlook that portion of *Illinois Brick* that expressly rejected the same argument that appellants reassert in this case that victim compensation outweighs effective private enforcement as the principal goal of the Clayton Act.

Each of these fundamental misconceptions will be discussed in turn in the following paragraphs.

A. It Is Not The Goal Of The Federal Antitrust Remedy To Compensate All Victims Of Anticompetitive Conduct

Appellants argue at length that the principal goal of the Sherman Act, the Clayton Act and the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §§ 1311 *et seq.*, was to provide damages to any person or corporation "injured or damnified" by prohibited anticompetitive conduct, including the ultimate consumer at the end of a chain of distribution. Brief of Appellant States at 22-23. The Clayton Act was enacted, appellants assert, to further open the "door of justice to *every man, whenever he may be injured* by those who violate the antitrust laws." *Id.* at 26 (emphasis in original). Appellants contend that the enactment of the Hart-Scott-Rodino Antitrust Improvements Act in 1976 evidenced Congress' belief that the Clayton Act was designed to provide, through state *parens patriae* actions, antitrust damage recoveries to all those who might be injured by violation of the antitrust laws. *Id.* at 27-29.

These arguments are offered without any apparent recognition that they were presented to and expressly rejected by this Court in *Illinois Brick*.[7] While *Illinois Brick*

[7] For example, as amicus curiae in the *Illinois Brick* case, the United States argued to this Court that the language of Section 4 of the Clayton Act, its purposes, and the "recently enacted Hart-Scott-Rodino Antitrust Improvements Act of 1976" demonstrate that indirect purchasers were intended to be allowed to recover antitrust damages under federal law. Brief of Amicus United States in *Illinois Brick Co.* v.

recognized Congress' desire to compensate those "injured" by violations of the antitrust laws, it concluded that the enforcement goals that served as the basis for damage recovery under the Clayton Act are best served by limiting the universe of those deemed "injured" under the Act to "the overcharged direct purchaser, and not others in the chain of manufacture and distribution." 431 U.S. at 729. This Court thus specifically rejected the arguments of the States in *Illinois Brick*—repackaged without material alteration in the briefs currently before the Court—regarding the Hart-Scott-Rodino legislation, and concluded that nothing contained in the history of that legislation can be read as supporting an intent by Congress, in enacting the Clayton Act in 1914 or Sherman Act in 1890, to provide damage recovery to indirect purchasers. *Illinois Brick*, 431 U.S. at 733-34 n.14.

This Court's more recent decision in *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983), also directly undercuts appellants' argument concerning the breadth of Congress' intent in enacting the federal treble damage remedy. At issue in *Associated General Contractors* was the question whether a labor union whose members were injured as a consequence of alleged anticompetitive conduct not directed at the plaintiff union had standing to raise damage claims under § 4 of the Clayton Act.

Illinois at 14-15 (set forth in relevant part in Appendix C). Even more striking is the amicus brief submitted in *Illinois Brick* by the National Association of Attorneys General on behalf of the Attorneys General of Forty-Seven States (including Alabama, Arizona and Minnesota), in which the amici asserted the *precise* arguments concerning the legislative history and purpose of the Sherman Act, the Clayton Act and the Hart-Scott-Rodino Antitrust Improvements Act as are being asserted in this case. Brief of Amici Forty-Seven States, *et al.*, in *Illinois Brick* at 10-16 (set forth in relevant part in Appendix B). California filed a separate amicus brief in *Illinois Brick* that did not directly address this issue.

To answer this question, the Court analyzed Congress' intent in enacting the original treble damage provision found in § 7 of the Sherman Act and in the current provision found in § 4 of the Clayton Act. While indicating that the broad language of the treble damage provisions would support an open-ended reading of the phrase "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws," the Court made clear that a proper interpretation of § 4 cannot "ignore the larger context in which the entire statute was debated." 459 U.S. at 529-30.

In evaluating this "larger context," the Court concluded that the legislative history establishes that Congress intended the damages provision "to be construed in the light of its common-law background." *Id.* at 531-32.[8] Recognizing the existence of state constitutional language that broadly decreed that every wrong shall have a remedy, the Court observed that the common law at the time nevertheless circumscribed the availability of damage recoveries in tort and contract litigation under such doctrines as foreseeability and proximate cause, directness of injury, certainty of damages, and privity of contract. *Id.* at 532-33. Drawing from this context, the Court concluded that "[a]lthough particular common-law limitations were not debated in Congress, the frequent references to common-law principles imply that Congress simply assumed that antitrust damages litigation would be subject to constraints comparable to well-accepted common-law rules applied in comparable litigation." *Id.* at 533.[9]

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[8] "The legislative history makes it perfectly clear that [Congress] expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition." *Id.*, quoting *National Soc'y of Professional Eng'rs* v. *United States*, 435 U.S. 679, 687-88 (1978). *See also Business Elecs. Corp.* v. *Sharp Elecs. Corp.*, 108 S. Ct. 1515, 1523-25 (1988) (evaluating the term "restraint of trade" in the context of its common law antecedents).

[9] The Court observed that legislators familiar with limits on common

Among the common law limitations that the Court recognized in *Associated General Contractors* as restricting the federal antitrust damage remedy were injuries that were "indirect, remote, and consequential." *Id.* at 534, citing *Loeb* v. *Eastman Kodak Co.*, 183 F. 704, 709 (3d Cir. 1910). It cited as consistent with this view Justice Holmes' statement—addressing an analagous Interstate Commerce Commission Act statute—that " '[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step.' " *Associated General Contractors*, 459 U.S. at 534, quoting *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918).[10] The Court then offered the following relevant summary:

> As this Court has observed, the lower federal courts have been "virtually unanimous in concluding that *Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.*" *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 263 n.14 (1972). Just last Term we stated:
>
> > "An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but 'despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable.' [*Illinois Brick Co.* v. *Illinois*, 431 U.S.], at 760 (Brennan, J., dissenting). *It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property.*" *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465, 476-77 (1982).

Associated General Contractors, 459 U.S. at 534-35 (emphasis added).[11] *See also Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104, 111 n.6 (1986) (the federal treble damage remedy was not intended to be afforded to "all injuries that might conceivably be traced to an antitrust violation").

Illinois Brick and *Associated General Contractors* both squarely reject appellants' argument that indirect purchaser recovery is consistent with—rather than an obstacle to—federal antitrust policy. Nor have appellants offered any evidence that Congress intended to allow indirect purchaser recovery under *state* law while forbidding it under the Clayton Act. Indeed, this Court's detailed and reasoned analysis in *Associated General Contractors* of the *state* common law background, if anything, suggests a contrary conclusion. *See Associated General Contractors*, 459 U.S. at 529-35.

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law damage recoveries "could hardly have intended the language [of the Sherman Act treble damage provision] to be taken literally." 459 U.S. at 533 n.28.

[10] In *Darnell-Taenzer*, this Court held that shippers could recover damages from the defendant railroad for excessive freight rates, even though the shippers could pass the overcharge on to their customers, stating that the statute "does not attribute remote consequences to a defendant." 245 U.S. at 533-34.

[11] The Court cited two treatises in existence at the time the Sherman Act was enacted. One stated that "[n]atural, proximate, and legal results are all that damages can be recovered for, even under a statute entitling one 'to recover *any* damage.' " 3 J. Lawson, *Rights, Remedies and Practice* 1740 (1890). Another was quoted as follows:

> The chief and sufficient reason for this rule is to be found in the impossibility of tracing consequences through successive steps to the remote cause, and the necessity of pausing in the investigation of the chain of events at the point beyond which experience and observation convince us we cannot press our inquiries with safety.

T. Cooley, *Law of Torts* 73 (2d ed. 1888). *See generally Associated General Contractors*, 459 U.S. at 532 n.24.

B. This Court, In *Hanover Shoe* And *Illinois Brick*, Identified The Encouragement Of Private Antitrust Enforcement As The Principal Congressional Purpose Underlying § 4 Of The Clayton Act

To avoid the preemptive force of *Illinois Brick*, appellants are compelled to argue that the Court's holding in that case was grounded not upon its interpretation of the congressional objectives underlying § 4 of the Clayton Act, but upon narrow prudential and administrative concerns relating to the functioning of the federal judiciary. Brief of Appellant States at 33; Brief of Amicus United States at 14; Brief of Amici Thirty-Five States, *et al.*, at 20; Brief of Amici National Conference of State Legislatures, *et al.*, at 9. Appellants thus assert that the Ninth Circuit mistakenly confused *Illinois Brick*'s authoritative interpretation of § 4 "as a proxy for congressional intent." Brief of Appellant States at 9. These arguments misread both *Hanover Shoe* and *Illinois Brick*, in which this Court could not have stated more clearly its conclusion that avoidance of unduly prolix litigation and diluted direct purchaser damage recoveries served Congress' *principal* goal in providing a private treble damage remedy under the federal antitrust laws—to promote *enforcement* of those laws.

Hanover Shoe rejected the theory that antitrust defendants could avoid liability by proving that their customers had passed on antitrust overcharges to their own customers. 392 U.S. at 488. In rejecting the defensive use of the pass-on theory, the Court evaluated the economic and evidentiary intricacies necessarily involved in proving whether, how, and to what extent various levels of market participants might have increased their prices as the result of upstream restraints on the market. The Court concluded that this process would require "long and complicated proceedings involving massive evidence and complicated theories." *Id.* at 493. The ultimate consumer, upon whom the overcharge would come to rest, "would have only a tiny

stake in a lawsuit and little interest in attempting a class action." *Id.* at 494. The Court concluded that these consequences would "substantially reduce[] [the] effectiveness" of treble damage actions. *Id.*

Nine years later, in *Illinois Brick*, this Court considered whether the passing-on theory could be used *offensively* to enable indirect purchasers to recover damages resulting from overcharges allegedly passed on to them through direct purchasers of price-fixed goods. The Court "decline[d] to abandon the construction given § 4 in *Hanover Shoe*," 431 U.S. at 729, and concluded that the indirect purchaser suits would result in "increasing the costs and diffusing the benefits of bringing a treble-damages action [and therefore] seriously impair this important weapon of antitrust enforcement." *Illinois Brick*, 431 U.S. at 745.

The Court emphasized throughout *Illinois Brick* that the concerns expressed in that case and in *Hanover Shoe* about effective antitrust enforcement flowed directly from its recognition of Congress' purpose in enacting the Clayton Act:

> [O]n balance, and until there are clear directions from Congress to the contrary, we conclude that *the legislative purpose in creating a group of "private attorneys general" to enforce the antitrust laws under § 4 . . . is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them* than by attempting to apportion the overcharge among all that may have absorbed a part of it.

431 U.S. at 746 (emphasis added)(citation omitted). *See also, e.g.*, 431 U.S. at 734 n.14 ("*the construction of* § 4 adopted in [*Hanover Shoe*] cannot be applied for the exclusive benefit of plaintiffs")(emphasis added); *id.* at 736-37 (discussing the "reaffirmance of the *Hanover Shoe construction of* § 4")(emphasis added).

Illinois Brick thus categorically concluded that Congress' "longstanding policy of encouraging vigorous private enforcement of the antitrust laws" compelled rejection of indirect purchaser recovery. *Id.*[12] Significantly, in arriving at this conclusion the Court expressly found that the goal of fully compensating all victims of price fixing was subordinate to the enforcement goal identified as the focus of the treble damage remedy under the Clayton Act. *Id.* at 746.

Appellants' response to *Hanover Shoe* and *Illinois Brick* is to offer the *ipse dixit* that the Court in those cases simply was concerned with "focused jurisprudential concerns" rather than the "broader enforcement, deterrence, and compensation objectives of Congress." Brief of Appellant States at 33. They contend that the court below "mistakenly accorded preemptive effect to policies which do not have 'clear and manifest' support in the legislative history of the federal antitrust laws." *Id.* But appellants are wrong. These "broader enforcement" objectives of Congress provided the express rationale for this Court's decisions in *Hanover Shoe* and *Illinois Brick*.[13] Congres-

[12] *See also Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 139 (1968) (prior decisions of the Supreme Court have been "premised on a recognition that the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws").

[13] The Ninth Circuit, in *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974), expressed the same view as that offered by appellants herein that the Court in *Hanover Shoe* was concerned with judicial economy and not with antitrust enforcement. 487 F.2d at 199. The unambiguous expressions concerning Congress' enforcement goals which punctuate this Court's decision in *Illinois Brick* (announced several years after, and repudiating the holding in *Western Liquid Asphalt*) should put such arguments to rest. Indeed, the Ninth Circuit more recently noted specifically that *Illinois Brick* was concerned with prohibiting economically complex evidence precisely because it would threaten the effective enforcement of the

sional concern with victim compensation was found to be outweighed by Congress' broader goal of promoting the private enforcement of federal antitrust laws.

III. THE NINTH CIRCUIT PROPERLY HELD THAT THE INDIRECT PURCHASER STATUTES AT ISSUE IN THIS CASE STAND AS AN OBSTACLE TO THE ACCOMPLISHMENT AND EXECUTION OF THE FULL PURPOSES AND OBJECTIVES OF CONGRESS

The Ninth Circuit decision below held that the indirect purchaser statutes of California, Minnesota and Alabama conflict with the fundamental policies that underlie the Clayton Act's enforcement scheme, and that these statutes are therefore preempted by federal law. *In re Cement and Concrete Antitrust Litigation*, 817 F.2d 1435, 1444-47 (9th Cir. 1987), Juris. Stat. App., A-18 to A-25.[14] The court found that allowing appellants' indirect purchaser claims "would complicate antitrust enforcement" because claims

antitrust laws. *Petroleum Products Antitrust Litigation*, 691 F.2d 1335, 1339-41 (9th Cir. 1982), *cert. denied*, 464 U.S. 1068 (1984).

[14] Arizona's statute does not appear, on its face, to grant indirect purchaser recovery rights, and the Ninth Circuit's decision did not specifically address the Arizona statute. In fact, the operative language of the Arizona statute is identical—but for the absence of a treble damage provision—to § 4 of the Clayton Act. *See* Appendix A. Elsewhere in the Arizona statute is a provision that explains that "[i]t is the intent of the legislature that in construing this article, the courts may use as a guide interpretations given by the federal courts to comparable federal antitrust statutes." Ariz. Rev. Stat. § 44-1412. *See* App. A. This was clearly the intention of the Uniform State Antitrust Act, on which the Arizona statute is based. *See* Uniform State Antitrust Act, Prefatory Note, 7B U.L.A. 712 (1985) ("Since the [Uniform State Antitrust] Act parallels the federal antitrust structure in its basic prohibitions, the following of federal precedent should be encouraged"). Under these circumstances and this Court's decision in *Illinois Brick*, it is difficult to comprehend how the Arizona statute can be construed as allowing indirect purchaser recovery. Nevertheless, if the Arizona statute is interpreted to allow the recovery of antitrust damages by indirect purchasers, it is preempted by the Clayton Act in the same manner as are the California, Minnesota and Alabama laws.

by direct and indirect purchasers would "often end up in the same lawsuit" and complications would be "unavoidable." 817 F.2d at 1445-46, Juris. Stat. App., A-21 to A-22. The court also found that indirect purchaser suits would "reduce the expected recoveries of direct purchasers and thus reduce the incentives for direct purchasers to bring private damages actions." *Id.* at 1446, Juris. Stat. App., A-22. Finally, the court determined that the state indirect purchaser laws "would allow both direct and indirect purchasers to collect for the same damages," *id.*, and would therefore conflict with the "express federal policy [that] condemns multiple liability for antitrust defendants." *Id.* at 1446, Juris. Stat. App., A-23. Each of these conclusions are demonstrably sound and individually sufficient to support the judgment below.

A. The State Indirect Purchaser Statutes Generate The Same Complications That *Illinois Brick* Found Would Undermine The Enforcement Goals Of § 4 Of The Clayton Act

Appellants contend that damage actions under the challenged state laws "will not *necessarily* inject complexity into federal antitrust actions," Brief of Appellant States at 35 (emphasis added), and that even where a federal court entertains a pendent state law claim, the lawsuit "does not *necessarily* require a complicated pass-on determination." *Id.* at 36 (emphasis added). Appellants' tepid endorsement of their indirect purchaser laws is revealing. In fact, it is plain that the serious and intractable complexities and labyrinthian economic conundrums that this Court found inevitable in indirect purchaser claims in *Illinois Brick* are equally unavoidable under the state indirect purchaser statutes at issue in this case.

Appellants offer the misleading factual assertion that the complexities described in *Illinois Brick* do not "necessarily" present themselves in this case. Brief of Appellant States at 36. They support this proposition by quoting

one of their own attorneys, who represented to the district court that "there is no evidence that any direct purchaser has made a claim for any quantity of price-fixed cement subject to a claim by a downstream purchaser." Brief of Appellant States at 36, citing J.A., 71. When pressed by the district court, however, California's counsel was forced to concede that the absence of evidence of overlapping direct and indirect purchaser claims flowed from the fact that it had not yet been collected. He went on to acknowledge that a "pass-on trial" would indeed be necessary to resolve claims as between direct and indirect purchasers in this case:

> Mr. Spiegel: . . . I would urge that the . . . claims processing proceed to the point to where we can see whether there are any duplicate, so-called duplicated claims. That is to see whether any middle man, direct purchaser, is claiming the same tons of cement that are being claimed by a state for a public works construction project.
>
> • • • •
>
> To the extent there is some duplication, then your Honor is faced with the question of how to allocate as between the state and the direct purchasers that share of the settlement . . . .
>
> The Court: I take it that would be a pass-on trial.
>
> Mr. Spiegel: Could be. It doesn't have to be, but it could be.
>
> The Court: What do you mean it doesn't have to be? What else could it be? . . . How could it be anything else?
>
> Mr. Spiegel: In all likelihood it may well be.
>
> • • • •
>
> Your Honor would then have to have a trial

> as between the competing claimants for that piece of the funds that would involve some form of pass-on.
>
> The Court: All right.

J.A., 77-79.[15]

As this colloquy amply demonstrates, appellants' statement that this case "does not necessarily require a complicated pass-on determination or in fact any such determination," Brief of Appellant States at 36, is, at best, incorrect. The record contains the concession that precisely such a determination would be necessary *in this case* if indirect purchasers are permitted to share in the settlement fund.

Equally untenable is appellants' assertion that, even if "further auditing" discloses a "handful" of indirect purchaser claims that overlap direct purchaser claims, "the economic analysis required to determine the scope of states' injuries is straightforward." Brief of Appellant States at 36-37. In the first place, appellants insist, as a matter of economic fact, that " '*passing on monopoly overcharges is not the exception: it is the rule.*' " Brief of Appellant States at 19 (emphasis in original). Thus, except where the direct purchaser has not pursued its claim, there will invariably be an overlap between direct and indirect purchasers and, as this Court pointed out in *Illinois Brick*, there may well be additional overlaps down the chain of distribution from one indirect purchaser to the next. 431 U.S. at 740 n.23.

Second, *Illinois Brick* easily disposed of this same argument, observing that, even adopting the array of "simplifying assumptions" employed in economic theory, the

[15] *See also* J.A., 79-81 (colloquy between the district court and counsel for the State of Minnesota discussing how Minnesota's statute, which suggests that the court "make every effort to avoid duplicative recovery," Minn. Stat. § 325D.57, by its very nature requires a pass-on determination).

need to measure elasticities of supply and demand will usually prove overly burdensome. 431 U.S. at 741-42.[16] The Court added:

> "in the real economic world rather than an economist's hypothetical model," the latter's drastic simplifications generally must be abandoned. Overcharged direct purchasers often sell in imperfectly competitive markets. They often compete with other sellers that have not been subject to the overcharge; and their pricing policies often cannot be explained solely by the convenient assumption of profit maximization.

Id. at 742.

Finally, in response to the same argument presented by appellants in this case that the economic analysis required for a pass-on determination "is straightforward," Brief of Appellant States at 37, the *Illinois Brick* Court rejected indirect purchaser claims *as a matter of law*, 431 U.S. at 724, 727, notwithstanding its express acknowledgment that "these difficulties and uncertainties will be less substantial in some contexts than in others." *Id.* at 743.[17]

[16] *See also* Landes & Posner, *An Economic Analysis of Illinois Brick*, 46 U. Chi. L. Rev. 603, 615-21 (1979).

[17] In fact, the degree of factual and economic complexity inherent in antitrust cases in which indirect purchaser claims are permitted is limited only by the imagination of the plaintiffs and potential plaintiffs, particularly where there are multiple levels of distribution. This point has perhaps best been illustrated in the district court's decision in *Philadelphia Hous. Auth.* v. *American Radiator & Standard Sanitary Co.*, 50 F.R.D. 13 (E.D. Pa. 1970), *aff'd sub nom. Mangano* v. *American Radiator & Standard Sanitary Corp.*, 438 F.2d 1187 (3d Cir. 1971). That case might well be described as a jurisprudential rendering of the Mother Goose story "The House That Jack Built," in which the court struggled with price fixing claims brought by homeowners against plumbing fixture manufacturers. The court attempted to trace the pattern of overcharges from the defendants to the wholesalers to the plumbing contractor to the builder and through prior homeowners be-

Consequently, if the indirect purchaser statutes at issue in this case are upheld, the district court *in this case* will be forced to allocate the settlement fund between direct and indirect purchasers. Appellants have conceded in the district court that this allocation will require a pass-on trial *in this case*, entangling the district court and the Clayton Act claims in precisely the type of evidentiary thicket that this Court in *Illinois Brick* determined would impermissibly obstruct enforcement of the federal antitrust laws. The Ninth Circuit's conclusion that this process is inconsistent with the congressional objectives identified in *Hanover Shoe* and *Illinois Brick*, and thus stands as an obstacle to the accomplishment of the full purposes of federal antitrust laws, is unassailable and must be upheld.

It is no answer to suggest, as do appellants and their amici, that the federal courts can avoid this "problem" by refusing to entertain pendent state law claims.[18] The jurisdiction of the federal courts to entertain such state law claims arising out of facts also constituting a colorable violation of the federal antitrust laws has been well established since the decision in *Moore* v. *New York Cotton Exchange*, 270 U.S. 593, 609-10 (1926). As in *Hurn* v. *Oursler*, 289 U.S. 238, 246 (1933), the federal and state law claims in the case at bar are "little more than the equivalent of different epithets to characterize the same group of circumstances."

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fore concluding that it would not allow the plaintiffs to pursue their claim. *See also City and County of Denver* v. *American Oil Co.*, 53 F.R.D. 620, 635-38 (D. Colo. 1971). Under the indirect purchaser statutes at issue in this lawsuit, it is unlikely that the court could have dismissed the homeowners' claim regardless of the "doubtful[] . . . economic connection between the initial overcharge . . . and the price paid by remote purchasers," and regardless of "complex problems of proof of such 'passing-on' of the overcharge." *Id.* at 635.

[18] Brief of Appellant States at 36-37; Brief of Amici Thirty-Five States, *et al.*, at 23 n.16; Brief of Amicus United States at 6, 17; Brief of Amici National Conference of State Legislatures, *et al.*, at 13-14.

The Court made clear in *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715 (1966), that cases asserting state and federal claims arising out of the same common nucleus of operative facts and raising potential preemption questions are *precisely* the type of suits for which the exercise of pendent jurisdiction is particularly appropriate:

> [T]he question whether the permissible scope of the state claim was limited by the doctrine of pre-emption afforded a special reason for the exercise of pendent jurisdiction; the federal courts are particularly appropriate bodies for the application of pre-emption principles.

383 U.S. at 729. *See also id.* at 727 ("There may . . . be situations in which the state claim is so closely tied to questions of federal policy that the argument for exercise of pendent jurisdiction is particularly strong").[19]

Appellants' argument that this Court should fashion a new rule of pendent jurisdiction under which federal courts would be required to refuse to entertain pendent state antitrust claims is further undercut by this Court's explanation in *Illinois Brick* that indirect purchaser actions present a paradigmatic occasion for *consolidated*—not separate—litigation. The Court noted that indirect purchaser claims implicate:

> all three of the interests that have traditionally been thought to support compulsory joinder of absent and potentially adverse claimants: the interest of the defendant in avoiding multiple lia-

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[19] As the Court in *Gibbs* made clear, federal courts possess broad discretion to determine whether to entertain pendent state claims. Consequently, appellants' "suggestion" for avoiding the preemption problem can only succeed, if at all, under a rule that precludes the acceptance by a federal court of pendent state indirect purchaser antitrust claims. Such a rule would seriously undermine the purposes of the pendent jurisdiction doctrine.

> bility for the fund; the interest of the absent potential plaintiffs in protecting their right to recover for the portion of the fund allocable to them; and the social interest in the efficient administration of justice and the avoidance of multiple litigation.

Illinois Brick, 431 U.S. at 737-38. The Court concluded that "the possibility of inconsistent judgments obtained by conflicting claimants .... justifies bringing potential and actual claimants together in one action if possible." *Id.* at 737 n.18.[20]

The principles that motivated the Court in *Illinois Brick* to deny a federal right of recovery to an indirect purchaser apply with equal strength to the claims of indirect purchasers under state law. They are essentially the same principles identified in *Gibbs* as the basis for the exercise of pendent jurisdiction. *Gibbs*, 383 U.S. at 726 (the source of the power to exercise pendent jurisdiction "lies in considerations of judicial economy, convenience and fairness to litigants"). Thus, the *Gibbs* Court's comments regarding the peculiar propriety of the exercise of pendent jurisdic-

[20] The amici brief of the National Conference of State Legislatures, *et al.*, is in apparent agreement. It correctly observes that "[w]here there is exclusive federal jurisdiction of federal claims and judicial economy calls for consolidated litigation of related state law claims, States and other state law plaintiffs have little choice as to forum." Brief of Amici National Conference of State Legislatures, *et al.*, at 13-14 n.8. These amici expressly acknowledge that the district court in this case "properly exercised pendent jurisdiction ... because of exclusive federal jurisdiction over the Sherman Act claims of direct purchasers relating to the same transactions and occurrences." *Id.* In fact, in *Aldinger* v. *Howard*, 427 U.S. 1 (1976), relied upon by these same amici, this Court observed that some litigation is particularly suited for consolidated proceedings, *e.g.*, where "*only* in a federal court may all of the claims be tried together." *Id.* at 18 (emphasis in original). Indirect purchaser litigation presents precisely that situation whenever, as is usually the case, Clayton Act claims and state indirect purchaser claims arise out of the same anticompetitive conduct.

tion by federal district courts where important federal policy is implicated, when viewed in conjunction with *Illinois Brick*'s conclusion that indirect and direct purchaser claims should be resolved in the same action "if possible," render appellants' "solution"—that federal courts refuse to entertain pendent indirect purchaser claims—completely unsupportable.[21]

What appellants ask the Court to do in this case is to carve out an "exception" to these principles—an "exception" under which the federal courts would refrain from exercising their undoubted *power* under Article III to adjudicate pendent state claims notwithstanding that *all* of the factors historically held to support the exercise of pendent jurisdiction are present. In short, appellants ask this court to overrule or abandon its decision in *Moore* v. *New York Cotton Exchange*, and to make the future exercise of pendent jurisdiction by the federal courts turn on whether one or more of the States may have expressed a preference against that exercise in a particular case or class of cases. To reach such a result in the absence of any negative impact on substantive federal policy other than rendering inefficient the conduct of litigation in the federal courts would be inconsistent with *Gibbs*; to reach such a result where it would, as here, affirmatively undermine substantive federal policy established in the Sherman and Clayton Acts would be totally unwarranted by any of this Court's cases.

[21] Acceptance of appellants' and amici's position on this question would significantly diminish, if not eliminate, the potential for settlement of federal antitrust class action lawsuits, since a settlement of the federal action could not, in and of itself, protect a defendant from potentially limitless state law actions by indirect purchasers. Indeed the settlement goal that influences federal policies concerning coordinated proceedings, pendent jurisdiction and class action suits argues strongly against a federal court's refusal to entertain pendent state law claims in this context, because doing so would further complicate, rather than simplify, resolution of federal antitrust lawsuits.

Moreover, appellants' suggestion that federal courts avoid complexity by choosing not to entertain pendent state law claims completely ignores those cases in which both federal and state antitrust claims are before a federal court and the court has *diversity* jurisdiction over the state law claims. Federal courts have no discretion to reject jurisdiction over such cases, and would be unable to prevent those problems that *Illinois Brick* determined would undermine federal antitrust enforcement.

B. State Indirect Purchaser Statutes Dilute Recoveries Available To Direct Purchasers Under § 4 Of The Clayton Act

The Ninth Circuit concluded that state indirect purchaser statutes undermine the federal antitrust laws by reducing the expected recoveries of direct purchasers, thereby diminishing the incentives for direct purchasers to bring private damages actions. 817 F.2d 1435, Juris. Stat. App., A-22. This conclusion flows naturally from the analysis in *Illinois Brick*, which reiterated *Hanover Shoe*'s "concern for the reduction in the effectiveness of [antitrust] suits if brought by indirect purchasers with a smaller stake in the outcome than that of direct purchasers suing for the full amount of the overcharge." *Illinois Brick*, 431 U.S. at 745. *Illinois Brick* concluded that apportioning damages between direct and indirect purchasers "would reduce the benefits to each plaintiff by dividing the potential recovery among a much larger group." *Id.*

Appellants do not and cannot contend that their indirect purchaser laws will not have the effect of diminishing the potential recoveries available to direct purchasers under the Clayton Act. To the contrary, they expressly concede that *their statutes could have that exact effect in this very case*. After explaining that the economic analysis necessary to determine the scope of indirect purchaser injury would be "straightforward" in that "handful" of situations involving overlapping claims in this case, Brief of Appellant

States at 36-37, appellants freely acknowledge that "[o]nce this determination is made by the trial court or by an appointed special master, the trial court can . . . allocate the settlement on the basis of actual injury in cases of overlapping claims . . . ." Brief of Appellant States at 37.

The alternative appellants propose to this allocation plan is equally remarkable. They propose that the settlement fund can be allocated "by crediting the full overcharge to the direct purchaser claiming under federal law *and* the amount of actual injury to the downstream victim claiming under state law." *Id.* (emphasis added). It is extremely unrealistic for appellants to presume that the settlement fund in this or any antitrust case will be able to satisfy the full treble damage entitlement of direct purchasers, let alone the provable actual damages of a long line of indirect purchasers. Under any distribution plan that the district court might construct, the amount available to direct purchasers necessarily will be diminished by the amounts allocated to claimants under appellants' indirect purchaser laws.[22]

Appellants' response to the manifest conflict between their indirect purchaser laws and the enforcement goals of the federal antitrust laws is to challenge the conclusion in *Illinois Brick* that Congress' enforcement goals are best

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[22] Amici National Conference of State Legislatures, *et al.*, make the perplexing argument that "[a]t worst, the same amount of money is divided up among different claimants." Brief of Amici National Conference of State Legislatures, *et al.*, at 16. But that is exactly the reason why direct purchasers have much to lose by adding indirect purchasers to those entitled to divide "the same amount of money." Appellants are defending their laws in their capacity as indirect purchaser claimants; thus they seek to share in the distribution that would otherwise go only to direct purchasers. Amici's statement is a euphemism for the reality that, in appellants' world, direct purchasers receive less—a result that this Court in *Hanover Shoe* and *Illinois Brick* concluded was antithetical to Congress' purpose in enacting Section 4 of the Clayton Act.

served by focusing recovery on direct purchasers. For example, appellants contend that "[r]eliance on direct purchasers to enforce the antitrust laws has been questioned by courts and scholars." Brief of Appellant States at 39. They support this assertion with a lengthy citation to law review articles and judicial decisions *all of which predate this Court's decision in Illinois Brick*. Significantly, these same arguments and authorities were presented to, and rejected by, this Court in *Illinois Brick*. *See, e.g.*, Brief of Amici Forty-Seven States and National Association of Attorneys General at 34-37 (Appendix B); Brief of Amicus United States at 21 (Appendix C); and Petition for Rehearing at 4-8 (Appendix D). *See generally Illinois Brick*, 431 U.S. at 746 & n.30.

The United States, as amicus curiae, accurately notes that "the state statutes cannot themselves be applied to require apportionment between direct and indirect purchasers of any federal damages recovered." Brief of Amicus United States at 19-20 (footnote omitted). The Government adds:

> Nor would the state statutes take away from the direct purchaser and give to the indirect purchaser a portion of the damages recovered under the federal statute that is attributable to passed-on overcharges. If any state statute is so construed, it would be preempted as so applied, as being in direct conflict with the direct purchaser's federal recovery rights set forth in *Hanover Shoe*.

Id. at 20 n.13.[23] This latter construction is *precisely* the construction of the state indirect purchaser statutes that

[23] The United States' view of the law expressed here is clearly correct, and demonstrates that the indirect purchaser statutes under scrutiny are either preempted or are meaningless. If the statutes do not allow allocation of damages between direct and indirect purchasers, then any recovery by an indirect purchaser will necessarily duplicate that awarded an upstream direct purchaser. This result conflicts with the "express federal policy [that] condemns multiple liability for antitrust defendants." *In re Cement and Concrete Antitrust Litig.*, 817 F.2d at 1446, Juris. Stat. App., A-23. *See* part III.C., *infra*.

the appellants are promoting in this case when they argue that the overlap between direct and indirect purchaser claims should be determined by the trial court, which should then "allocate the [judgment] on the basis of actual injury in cases of overlapping claims . . . ." Brief of Appellant States at 37.[24]

As the Ninth Circuit correctly observed, the dilution of direct purchaser recovery is a very real probability whenever antitrust claims are pursued both by direct and indirect purchasers, particularly in the multitude of cases that result in settlement. In such cases the settlement fund will be allocated among direct purchasers if the Ninth Circuit is upheld, or divided further between direct and indirect purchasers if the Ninth Circuit is reversed. This is also true in fully litigated cases in which the defendant's resources are insufficient to satisfy the multiple damage claims to which it is exposed, and which may in fact be exhausted by multiple levels of indirect purchaser claimants before the direct purchaser plaintiff has the opportunity to have his Clayton Act case resolved. It requires

[24] The United States' contention that reduction of direct purchaser recovery in this case flows from direct purchasers' agreement to participate in the settlement and resolve the allocation issue later, Brief of Amicus United States at 20 n.14, begs the underlying question. The settlement in this case proceeded with the express understanding that the indirect purchaser claims were still open to challenge. In fact, in affirming the district court's decision rejecting indirect purchaser claims, the Ninth Circuit held, as a *factual* matter, that "the parties to the settlement agreement did not waive their right to challenge the indirect purchase claims." 817 F.2d at 1447, Juris. Stat. App., A-26. This factual determination by the two courts below is entitled to significant deference by this Court. *Goodman* v. *Lukens Steel Co.*, 107 S. Ct. 2617, 2623 (1987); *Graver Tank & Mfg. Co., Inc.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

no citation to authority to demonstrate that upholding the challenged statutes will result in a dilution of the rights and expectations of direct purchasers, together with a corresponding reduction in their incentive to pursue federal antitrust suits. Thus, instead of promoting private enforcement by direct purchasers—a clear goal of Congress in enacting § 4 of the Clayton Act—application of appellants' indirect purchaser statutes undercuts directly the incentives of antitrust plaintiffs under § 4 to pursue recovery for anticompetitive conduct, the same result rejected in *Illinois Brick*. It should be rejected here as well.

C. The Ninth Circuit Properly Held That Appellants' Indirect Purchaser Statutes Give Rise To Multiple Liability In Contravention Of Congressional Policy

A third basis for the decision of the Ninth Circuit in this case was its adherence to the "express federal policy" that prohibits multiple liability for defendants in antitrust cases. 817 F.2d at 1446, Juris. Stat. App., A-23. The court found that recognizing the appellants' claims "would allow both direct and indirect purchasers to collect for the same damages." *Id.* The authorities upon which the Ninth Circuit predicated its rejection of such multiple recoveries, *Associated General Contractors*, 459 U.S. at 544, *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465, 474-75 (1982), and *Illinois Brick*, 431 U.S. at 731 n.11, demonstrate that the Ninth Circuit's conclusion was certainly correct.

The Court in *Illinois Brick* found that "allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants." 431 U.S. at 730. This risk of "unwarranted multiple liability" would come about by presuming that the direct purchaser is damaged based upon the full overcharge while precluding the defendant "from using that presumption against the other plaintiff." *Id.* The Court held that "overlapping recoveries are certain to result from the two lawsuits unless the

indirect purchaser is unable to establish any pass-on whatsoever." *Id.* at 730-31. The Court flatly declared itself "unwilling to 'open the door to duplicative recoveries' under § 4." *Id.* at 731, quoting *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 264 (1972). In fact, the Court stressed that the risk of even "a little slopover [of duplicative damages] on the shoulders of the wrongdoers" is unacceptable. 431 U.S. at 731 n.11.[25]

Illinois Brick's rejection of the possibility of multiple liability was premised on the decision in *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972), in which this Court's refusal to allow potential multiple liability under the Clayton Act was based specifically on an evaluation of congressional intent in establishing damage remedies under the federal antitrust laws. *Id.* at 262-66. This principle has been reaffirmed by this Court on at least two more occasions since its decision in *Illinois Brick*. *See Associated General Contractors, Inc.* v. *Carpenters*, 459 U.S. 519, 544 (1983) (plaintiffs lacking "antitrust standing" cannot sue for damages under the federal antitrust law because they could combine with other plaintiffs to assert "conflicting claims to a common fund, the amount of the alleged overcharge, thereby creating the danger of multiple liability for the fund"); *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465, 473-75 (1982) (reaffirming *Illinois Brick's* concern that multiple antitrust liability would unacceptably splinter and burden enforcement of the federal antitrust laws). *See also Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104, 111 n.6 (1986) ("[i]n order to protect against multiple lawsuits and duplicative recoveries, courts should examine other factors in addition to antitrust injury, such

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[25] The dissent in *Illinois Brick* did not disagree with the majority's conclusion concerning the existence of a federal policy against multiple liability in antitrust cases, but rather believed that procedural mechanisms existed to minimize the risk of such liability. 431 U.S. at 761-64 (Brennan, J., dissenting).

as the potential for duplicative recovery, the complexity of apportioning damages, and the existence of other parties that have been more directly harmed to determine whether a party is a proper plaintiff under § 4"); *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 342 (1979) ("[a] central premise of our holding in *Hawaii* was a concern over duplicative recoveries").

Significantly, as Justice Marshall explained in his dissenting opinion in *Associated General Contractors*, the issue of duplicative recovery is not a judicially created concern, but is an inherent and necessary element of the remedial scheme established by Congress in enacting § 4 of the Clayton Act. Although dissenting from the Court's finding that the union plaintiff lacked standing to pursue its antitrust damage claims, Justice Marshall nonetheless recognized that:

> Significantly, the risk of duplicative recovery that the Court relied on in both *Illinois Brick* and *Hawaii* v. *Standard Oil Co.* is not simply a judicially invented reason for restricting the broad scope of § 4. Permitting two recoveries based on the very same injuries would be contrary to the basic statutory scheme governing damages actions, for the result would be to subject antitrust defendants to sextuple-damages awards rather than the treble-damages awards that Congress contemplated.

Associated General Contractors, 459 U.S. at 550 n.7 (Marshall, J., dissenting). This view echoed the majority opinion, which viewed the "potential for duplicative recovery or complex apportionment of damages" as relevant to a denial of standing under § 4. *Id.* at 545.[26]

[26] The response by amici Thirty-Five States and the District of Columbia to the Court's repeated concern about duplicative recovery is revealing. They can do no more than contend, without explanation or foundation, that the Court's concerns are "*consistent*" with the "expansive remedial purpose" of Congress but "do[] not *constitute* that purpose," Brief of Amici Thirty-Five States, *et al.*, at 22 (emphasis added), and that the Court, in discussing the issue in *Illinois Brick*, "was not setting forth a statement of the purposes and objectives of Congress." *Id.* at 22 n.15.

Appellants attempt to respond to this issue by arguing that, had Congress truly intended to avoid duplicative recoveries under the federal antitrust laws, it would not have adopted a compound enforcement mechanism within the federal antitrust regime that permits the imposition of criminal fines, incarceration and injunctive relief as well as the recovery of damages for the same conduct. Brief of Appellant States at 23-24. Brief of Amicus United States at 22-23 n.17; Brief of Amici National Conference of State Legislatures, *et al.*, at 14.

This argument misses a point that highlights the principal flaws in appellants' position. Congress, in enacting the Sherman and Clayton Acts, settled on a broad regulatory regime designed to deter anticompetitive conduct. This regime included mechanisms for government enforcement (including fines, imprisonment and seizure of assets) and a mechanism for private enforcement, embodied in the treble damage provision of the Clayton Act. Congress' concern about duplicative recoveries—as discussed in *Illinois Brick*, *Hawaii* v. *Standard Oil* and *Associated General Contractors*—has never been understood to suggest that public and private enforcement mechanisms cannot coexist and complement one another. These cases simply express Congress' view that the *private* enforcement goals promoted under § 4 are best served by allowing no more or less than treble damages for a given anticompetitive overcharge. Sextuple or greater damages are unfair, burdensome and may result in excessive levels of deterrence.

The Ninth Circuit properly considered the "express federal policy" against duplicative antitrust liability in an-

nouncing the decision below. It observed that where a state indirect purchaser claim is adjudicated or settled prior to the resolution of a federal claim by the direct purchaser, either the federal claim would be barred to avoid possible multiple liability, a result clearly irreconcilable with federal policy, or the direct purchaser will be allowed to recover under his federal claim, subjecting the defendant to unacceptable multiple liability. 817 F.2d at 1446, Juris. Stat. App., A-23 to A-24. Where the federal claim is resolved first (adversely to defendant), the state indirect purchasers nonetheless recover damages for the same overcharge.[27] Finally, in federal cases in which the state and federal claims are litigated at the same time (as in this case), the only way to avoid potential multiple liability is to reduce the direct purchaser claims under § 4 to the extent of the pass-on—a result flatly irreconcilable with *Illinois Brick*.

Appellants respond by pronouncing that "[a]s a practical matter, the asserted danger of duplication is typically more hypothetical than real." Brief of Appellant States at 34. In fact, however, appellants' own argument gives rise to the unavoidable conclusion that duplication is *inevitable*

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[27] Minnesota's statute might arguably not allow indirect purchaser recovery in such a case. However, that is by no means clear from the Minnesota statute in cases where there was, indeed, a substantial pass-on, and appellants have not explained how duplicate recoveries can be avoided if indirect purchasers are to recover anything under that law. Minnesota's scheme also cannot avoid the multiple liability problem in situations where the state indirect purchaser claims are resolved first. Nor, as the Ninth Circuit properly held, does the Minnesota statute avoid the multiple liability issue as it arises in *this* case, because allocation of a portion of the settlement fund to indirect purchasers will necessarily involve the payment of two sets of damages for the same anticompetitive overcharge. *See* J.A., 72-73, (where the California representative conceded to the district court that, if allocation out of the settlement fund is ten cents per dollar overcharge, both the direct and the indirect purchaser of any given unit of cement could recover that sum, and the fund would be taxed twenty cents per dollar of overcharge).

wherever liability is found. This inevitability flows from two primary arguments in the appellants' brief: appellants' contend that (1) antitrust economics and experience demonstrate that downstream purchasers will bear the brunt of a price fixing conspiracy in most cases, Brief of Appellant States at 17-20 (" '*passing on monopoly overcharges is not the exception: it is the rule*' "), Brief of Appellant States at 19, quoting Harris & Sullivan, *Passing On The Monopoly Overcharge: a Comprehensive Policy Analysis*, 128 U. Pa. L. Rev. 269, 276 (1979) (emphasis in original); and (2) state law remedies for downstream purchasers will not reduce or impair recoveries under the Clayton Act, Brief of Appellant States at 12. Under appellants' analysis, federal direct purchasers will recover treble 100% of an antitrust overcharge, and state indirect purchasers will assert claims to at least 100% of the same overcharge. If the state laws allow multiple (e.g., treble) damages, and if each indirect purchaser in the chain of distribution can advance a similar claim, the actual exposure of the defendant may be sextuple the actual overcharge or more.[28]

Recognizing the inevitability of this conclusion, appellants argue, relying on *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984), that States can impose greater punishment for the same conduct without being preempted by the federal law. Such reliance is misplaced.

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[28] As described above, and contrary to appellants' assertion, multiple liability under indirect purchaser statutes is a virtual certainty. This possibility is made all the more likely by appellants' assertion that *res judicata* would not bar a subsequent claim in federal court following a state court judgment for indirect purchasers, and that merger and bar would not preclude a subsequent action for downstream injuries in state court following a direct purchaser action in federal court. Brief of Appellant States at 37-38. The Ninth Circuit properly evaluated these concerns in holding that the state indirect purchaser statutes create an unacceptable risk of multiple liability, in contravention of congressional purpose as described in *Hawaii* v. *Standard Oil*, *Illinois Brick*, *McCready* and *Associated General Contractors*.

In *Silkwood*, an action was brought under state common law tort principles to recover damages in connection with injuries resulting from radiation contamination at a federally regulated nuclear energy facility. The question before this Court was whether the state punitive damage remedy was preempted by the federal nuclear regulatory scheme.

After reviewing the history of the federal regulation at issue, this Court held that Congress had not provided any federal remedy for persons suffering injuries from radiation in a nuclear plant, had not intended to foreclose state remedies for such injuries, and had even assumed that state remedies would be available. The Court further held that such remedies "did not frustrate any purpose of the federal remedial scheme" at issue in that case. 464 U.S. at 257. The Court was careful to point out, however, that it was *not* suggesting "that there could never be an instance in which the federal law would pre-empt the recovery of damages based on state law." *Id.* at 256. It simply held that, under the federal regime regulating development and use of nuclear energy, the imposition of a state common law penalty in a personal injury case damage action would not frustrate the objectives of federal law.

Thus, *Silkwood* does not hold that States may set up remedial mechanisms that replicate, complicate and dilute specific federal enforcement measures for specified conduct. It is not inconsistent with the Ninth Circuit decision in this case to hold, as the Court did in *Silkwood*, that Congress may decide to tolerate certain tension between state liability laws and federal safety regulation. But *Silkwood* cannot be extended to sanction the state indirect purchaser remedies at issue here, especially where this Court has already described the adverse impact that such actions will have on the federal remedy. Nor does the result reached by the Ninth Circuit in this case threaten

any other provision of state antitrust law that does not impair or inhibit the federal treble damage action.[29]

IV. CONGRESSIONAL SILENCE DOES NOT SUPPORT AN INFERENCE THAT CONGRESS INTENDED TO ALLOW THE STATES TO ENACT ANTITRUST LAWS THAT PRESENT AN OBSTACLE TO THE ACCOMPLISHMENT AND EXECUTION OF THE GOALS OF THE FEDERAL ANTITRUST LAWS

A. Congressional Silence Regarding Preemption During The Sherman Act And Clayton Act Debates Offers No Support For The Proposition That Congress Intended To Permit Inconsistent State Antitrust Regulation

Appellants and their amici argue that the failure of Congress explicitly to preempt pre-existing state regulation of anticompetitive conduct during and after enactment of the Sherman and Clayton Acts establishes a presumption that their recently enacted indirect purchaser laws are not preempted by federal law. Brief of Appellant States at 20-21; Brief of Amici National Association of State Legislatures, *et. al.*, at 4-7; Brief of Amici Thirty-Five States, *et. al.*, at 34-40. However, their analysis ignores the historical context of the enactment of the Sherman and Clayton Acts and fails to provide any evidence of congressional endorsement of the state indirect purchaser laws.

In 1890, at the time of enactment of the Sherman Act, a generally narrow view of the federal government's Commerce Clause powers prevailed. *See generally* Hovenkamp, *State Antitrust in the Federal Scheme*, 58 Ind. L.J. 375

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[29] The other preemption cases cited by appellants and amici that purportedly allow States to provide additional remedies for conduct also prohibited by federal law are similarly limited to remedies that do not conflict with federal policy. *See Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 130 (1978); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 143, 146 (1963); *Colorado Anti-Discrimination Comm'n* v. *Continental Air Lines, Inc.*, 372 U.S. 714, 722 (1963); *California* v. *Zook*, 336 U.S. 725, 735 (1949).

(1983). *See also* Werden & Balmer, *Conflicts Between State Law and the Sherman Act*, 44 Pitt. L. Rev. 1, 49-56 (1982). That view of the Commerce Clause would have been generally inconsistent with consideration by Congress of any significant overlap between federal and state antitrust enforcement. In fact, the legislative history of the Sherman Act is replete with observations akin to that of Senator Sherman, to the effect that "[i]f the combination is confined to a State the State should apply the remedy; if it is interstate and controls any production in many States, Congress must apply the remedy." 21 Cong. Rec. 2457 (1890).[30]

Indeed, the legislative history of the Sherman Act, and a decision of this Court announced five years after the Sherman Act was enacted, indicate a far narrower view of the Federal Government's Commerce Clause power than even Senator Sherman's comment suggests. This perception of congressional power under the Commerce Clause held that Congress could not regulate "manufacturing" even if the manufactured products were intended for interstate shipment, and that Congress' Commerce Clause power was limited solely to the time that the interstate transportation of a commodity was taking place.[31] In *United States* v. *E.C. Knight Co.*, 156 U.S. 1, 12 (1895), the Court held that manufacturing was not commerce, and that the

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[30] *See also* H.R. Rep. No. 1707, 51st Cong., 1st Sess. 1 (1890) ("Congress has no authority to deal, generally, with the subject within the States, and the States have no authority to legislate in respect of commerce between the several States or with foreign nations"); 21 Cong. Rec. 2460 (1890) ("Each State can deal with a combination within the State, but only the [Federal] Government can deal with combinations reaching not only the several States, but the commercial world. This bill does not include combinations within a State").

[31] *See* 20 Cong. Rec. 1460 (1889) (comments of Senator George); 21 Cong. Rec. 1769 (1890) (comments of Senator George); 21 Cong. Rec. 2465 (comments of Senator Vest); *id.* at 2467-68 (comments of Senator Hiscock); *id.* at 2469-70 (comments of Senator Reagan).

Sherman Act could therefore not reach a manufacturing trust composed of almost all of America's sugar refineries even though these refineries were dispersed among several states.

As this brief review illustrates, the Sherman Act, as contemplated by its framers, was designed to address conduct that was within the range of federal Commerce Clause power and was not subject to the application of state laws. Thus, under either the narrow view of the Commerce Clause described by this Court in *E.C. Knight* or the somewhat more expansive comments of Senator Sherman, any combination or conspiracy whose members were entirely within a single state fell within the *exclusive* jurisdiction of the States themselves. Federal antitrust law and state antitrust law were intended to be applied primarily to mutually exclusive activities.[32]

This understanding of the scope of the Commerce Clause power and, therefore, the Sherman Act, has changed dramatically. *E.C. Knight* was overruled in *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948), where the Court held that a price fixing conspiracy among sugar refiners all located within a single State was subject to Sherman Act attack. As one commentator has noted:

> Federal antitrust law today applies to real estate brokers, agricultural products located completely within a single state, and even hospital services. The result of this expansive reach is that the overwhelming majority of assertions of state antitrust are in areas within the reach of federal antitrust law as well. In other words, the classification of restraints as purely intrastate and thus within the exclusive jurisdiction of state an-

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[32] *See E.C. Knight*, 156 U.S. at 13. *See generally* Hovenkamp, *State Antitrust in the Federal Scheme*, 58 Ind. L.J. 375, 378-94 (1983).

> titrust, or interstate and thus within the exclusive domain of federal law has long since passed. The vitality of this distinction is the exception rather than the rule.

Hovenkamp, *State Antitrust in the Federal Scheme*, *supra*, 58 Ind. L.J. at 389 (footnotes omitted).

In view of this history, it is misleading to assume that congressional silence on the preemption question at the time the Sherman and Clayton Acts were enacted should be read as an expression of congressional intent not to preempt state antitrust regulation that might someday interfere with the effective implementation of the federal law.[33] Since federal and state antitrust enforcement were not perceived to overlap or to create the potential for conflict, Congress did not find it necessary to state explicitly that state law must give away if it obstructed the operation or effectiveness of the federal law. Congress' failure to address specifically the preemption issue thus

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[33] It is equally facile for appellants and their amici to attempt to bolster this argument with references to recently enacted laws—*e.g.* The National Cooperative Research Act of 1984, 15 U.S.C. § 4304(c) and the Export Trading Company Act of 1982, 15 U.S.C. § 4016—in which preemption provisions are expressly included. Brief of Amici Thirty-Five States, *et al.*, at 38-40; Brief of Amicus United States at 11; Brief of Amici National Conference of State Legislatures, *et al.*, at 6. These laws were enacted under the current, expansive view of the Commerce Clause, in which an overlap between state and federal enforcement regimes is the rule rather than the exception. Indeed, the reference by National Conference of State Legislatures, *et al.*, to the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15 undercuts appellants' argument. That Act, which expressly exempts the business of insurance from the federal antitrust laws in order to enable exclusive state regulation of the field, was enacted in 1945 specifically to overcome a Supreme Court decision of the prior year holding that insurance was commerce and thus subject to federal regulation. Up until that point, no specific exemption was deemed necessary, because earlier precedent had held that insurance was not commerce. *See generally*, *Group Life & Health Ins. Co.* v. *Royal Drug Co., Inc.*, 440 U.S. 205, 217-20 (1979).

does not support the conclusion that appellants would have this Court draw. At most, this silence may be read to demonstrate that Congress itself simply did not focus on the issue. Certainly, no rational reading of congressional silence can support appellants' view that Congress intended to allow the States to enact rules that presented obstacles to the purposes of the federal antitrust laws.

B. Congressional Inaction With Respect To The District Of Columbia Antitrust Act Does Not Demonstrate Congressional Approval Or Endorsement Of State Indirect Purchaser Laws

Appellants and their amici argue, Brief of Appellant States at 29-31; Brief of Amici Thirty-Five States, *et. al.*, at 25-30, that congressional failure to overrule a provision of the District of Columbia's Antitrust Act evidences Congress' intent to allow indirect purchaser recovery at the state level. This argument is legally and logically deficient. The relevant portion of the District of Columbia Act, D.C. Code Ann. § 28-4509, is but one small element of a comprehensive antitrust regulatory scheme established in the District in 1980. Although this Act—enacted by the District government and *not* by Congress—was forwarded to certain congressional committees, Congress took no action whatsoever with respect to this legislative package. The District government's enactment became law automatically at the expiration of 30 days from its submission.

Congress' *inaction* concerning the District statute is hardly the "clear direction[] from Congress" that *Illinois Brick* deemed necessary to alter this Court's conclusion that indirect purchaser recovery is incompatible with the enforcement goals of the antitrust laws. 431 U.S. at 746. In fact, it is well established that legislative inaction is a "weak reed upon which to lean" and a "poor beacon to follow" in construing a statute where, as here, there is no evidence that the specific provision of the legislation in question was ever called to the legislature's attention.

See 2A Sutherland, *Statutory Construction* § 49.10 at 407-08 (4th ed. 1984) and cases collected therein.[34] *See also Inner City Broadcasting Corp.* v. *Sanders*, 733 F.2d 154, 159-60 (D.C. Cir. 1984) ("[b]efore we will find relevance in congressional silence, at a threshold we must be shown that Congress was 'obviously aware' of the policy in question and consciously acted or did not act in response to that policy"); *Advanced Micro Devices* v. *Civil Aeronautics Board*, 742 F.2d 1520, 1541 (D.C. Cir. 1984) ("[i]naction by Congress is due generally to reasons too diffuse, ephemeral, and ultimately unaccountable" to afford it weight in construing a statute); *United States* v. *Hill*, 676 F. Supp. 1158, 1167 n.12 (N.D. Fla. 1987) ("[i]nferring a 'clear' intent through congressional silence is not a sound interpretive policy").[35]

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[34] Recently this Court reiterated its "reluctan[ce] to draw inferences from Congress' failure to act." *Schneidewind* v. *ANR Pipeline Co.*, 108 S. Ct. 1145, 1154 (1988), *citing American Trucking Ass'ns, Inc.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 387 U.S. 397, 416-18 (1967); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 n.11 (1969).

[35] The courts have been careful to distinguish between inaction flowing from an apparent lack of awareness of the issue in question—from which no inference of intent can be drawn—and failure to change a challenged interpretation of a law in the face of express knowledge of, and attention to, a judicial construction that is under attack. In the latter circumstance, the courts have occasionally held that reconsideration or reenactment of a statute without change will incorporate settled judicial or administrative interpretations of the statute, at least where Congress can be shown to have been aware of these interpretations. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 381-82 & n.66 (1982); *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 845-46 (1986); *Lindahl* v. *Office of Personnel Management*, 470 U.S. 768, 782-83 & n.15 (1985); *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 535 (1982); *United States* v. *Board of Comm'rs*, 435 U.S. 110, 134 (1978); *Lorillard* v. *Pons*, 434 U.S. 575, 580-81 (1978). These cases serve to distinguish Congress' repeated rejection of efforts to repeal *Illinois Brick* by legislation—where Congress is aware of the judicial or administrative interpretation under attack and has chosen not to alter it—from Congress' failure to

Appellants' arguments relating to congressional silence are based upon manifestations of congressional sentiment that are too gossamer and illusive to read. Congressional inaction might evidence approval, inability to agree, unawareness, indifference, or even political cowardice. *See Johnson* v. *Transportation Agency, Santa Clara County*, 480 U.S. 616, 672, 1473 (1987) (Scalia, J., dissenting). This is an insufficient basis for a finding of congressional intent.

CONCLUSION

While appellants have broad power to regulate commerce and to provide themselves and their citizens with extensive protections from unfair trade practices or anticompetitive conduct, the exercise of such power cannot present direct and substantial obstacles to congressional objectives underlying § 4 of the Clayton Act. This Court already has held that indirect purchaser remedies indistinguishable in impact from appellants' laws materially inhibit the effectiveness of federal treble damage antitrust actions. The Court should therefore affirm the decision of

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veto the D.C. Antitrust Act—where no showing has been made that Congress focused upon, or was even aware of, the indirect purchaser provision contained therein.

the Ninth Circuit that the statutes at issue in this case are preempted by the federal antitrust laws.

December 30, 1988

Respectfully submitted,

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APPENDIX

APPENDIX A

CONSTITUTIONAL AND STATUTORY AUTHORITIES INVOLVED

Constitution of the United States

The Supremacy Clause, art. VI, cl. 2, provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Federal Law and Authority

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

Section 4 of the Clayton Act, 15 U.S.C. § 15(a), provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust law may sue therefor in any district of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Alabama Law

Alabama Code § 8-10-1 provides:

> Any person or corporation who engages or agrees with other persons or corporations or enters, directly

or indirectly, into any combination, pool, trust or confederation to regulate or fix the price of any article or commodity to be sold or produced within this state or any person or corporation who enters into, becomes a member of or party to any pool agreement, combination or confederation to fix or limit the quantity of any article or commodity to be produced, manufactured, mined or sold in this state must be fined, on conviction, not less than $500.00 nor more than $2,000.00.

Alabama Code § 6-5-60 provides:

Any person, . . . injured or damaged by an unlawful trust, combine or monopoly, or its effect, direct or indirect, may, in each instance of such injury or damage, recover the sum of $500.00 and all actual damages from any person, firm or corporation creating, operating, aiding or abetting such trust, combine or monopoly . . .

Arizona Law

Arizona Rev. Stat. § 44-1402 provides:

A contract, combination or conspiracy between two or more persons in restraint of, or to monopolize, trade or commerce, any part of which is within this state, is unlawful.

Arizona Rev. Stat. § 44-1408A provides:

The state, a political subdivision or any public agency threatened with injury or injured in its business or property by a violation of this article may bring an action for appropriate injunctive or other equitable relief, damages sustained and, as determined by the court, taxable costs and reasonable attorney's fees.

Arizona Rev. Stat. § 44-1412 provides:

This article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among those states that enact it. It is the intent of the legislature that in construing this article, the courts may use as a guide interpretations given by the federal courts to comparable federal antitrust statutes.

California Law

Section 1 of the Cartwright Act, Cal. Bus. & Prof. Code § 16720, provides:

A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:

(a) To create or carry out restrictions in trade or commerce.

(b) To limit or reduce the production, or increase the price of merchandise or of any commodity. * * *

(d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use, or consumption in this State. * * *

Business and Professions Code section 16726 provides:

Except as provided in this chapter, every trust is unlawful, against public policy and void.

Business and Professions Code section 16750(a) provides:

Any person who is injured in his or her business or property by reason of anything forbidden or de-

clared unlawful by [California antitrust law], . . . may sue therefor . . . to recover three times the damages sustained by him or her, interest on his or her actual damages . . ., and shall be awarded a reasonable attorney's fee together with the costs of the suit.

Such action may be brought by any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter, regardless of whether such injured person dealt directly or indirectly with the defendant.

Minnesota Law

Minn. Stat. § 325D.53, subd. 1(1)(a) (1986) provides:

Without limiting section 325D.51, the following shall be deemed to restrain trade or commerce unreasonably and are unlawful:

(1) A contract, combination or conspiracy between two or more persons in competition:

(a) for the purpose or with the effect of affecting, fixing, controlling or maintaining the market price, rate or fee of any commodity or service.

Minn. Stat. § 325D.57 (1986) provides:

Any person . . . injured directly or indirectly by a violation of [Minnesota antitrust law] shall recover three times the actual damages sustained, together with costs and disbursements, including reasonable attorneys' fees. In any subsequent action arising from the same conduct, the court may take any steps necessary to avoid duplicative recovery against a defendant.

APPENDIX B

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-404

ILLINOIS BRICK COMPANY, ET AL.,
Petitioners,

vs.

STATE OF ILLINOIS, ET AL.,
Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, OREGON, RHODE ISLAND AND PROVIDENCE PLANTATIONS, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN AND WYOMING, THE COMMONWEALTHS OF PENNSYLVANIA AND VIRGINIA AND

THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL AS AMICI CURIAE.

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1. *The Congress which enacted the Sherman Act intended to extend relief to actual users and not simply to middlemen.* Section 4 of the Clayton Act was originally enacted as section 7 of the Sherman Act of 1890. The evils which the 51st Congress sought to proscribe by the Sherman Act were the great trusts of the day such as the Sugar Trust and the Beef Trust. The 51st Congress recognized that individual consumers were the ones primarily injured by these trusts. Even though individual consumers of sugar, for example, obviously did not purchase directly from the trust, *see United States v. E. C. Knight Co.*, 156 U.S. 1 (1895), Congress intended that they be able to bring damage actions against the price-fixers. The sponsors of this seminal legislation therefore intended that it afford relief to the actual users or ultimate consumers of conspiratorially priced products and not simply to middlemen. Indeed, the debate over the damage remedy centered on means to ease the procedural burdens of consumers rather than on whether they would be entitled to assert claims in the first instance.

In explaining who was "injured" within the meaning of the damage remedy, Senator George, for example, included the ultimate consumer or actual user:

> An advance in the price to the middleman is not mentioned in the bill for the obvious reason that no such advance would damnify them; it would rather be of benefit, as it would increase the value of the goods he has on hand. He buys to sell again. He buys only for profits on a subsequent sale. So whatever he pays he receives when he sells, together with the profit on his investment; and so on all of them; including the last, who sells directly to the consumer. The consumer, therefore, paying all its increased price advanced by the middlemen and profits on the same, is

the party necessarily damnified or injured. 21 Cong. Rec. 1767 (1890).

The remarks of Senator Spooner also typify the concern of the 51st Congress for the damage done by price-fixing to individual consumers:

> Most if not all of the combinations . . . aimed at by the bill, are detrimental to the public interest. I think of them all it will be agreed that two of them, whose ramifications extend throughout the whole country and who directly affect the people generally in the country, the sugar trust and what is called the beef combine, are infamous in their oppression, the sugar trust dealing with an article which goes into the daily consumption of the people, which goes into every house, to every family. I believe 52 pounds per year per capita are used by the people of the United States. The object of this trust is to keep up to consumers the price of sugar. The beef combine . . . has been so successful as to maintain at the war rate the price of beef to consumers throughout the United States .... 21 Cong. Rec. 2640.

There can be no doubt, then, that the 51st Congress recognized that consumers were injured by price-fixing even though they were one or more levels removed from the price-fixers in the chain of distribution. Since a consumer was, concededly, a "person . . . injured in his business or property," the debate in the 51st Congress centered on the means to facilitate consumer damage actions under the predecessor of section 4 rather than on whether the consumer should be allowed to sue at all.[4]

[4] In discussing an early version of the bill, for example, Senator Hiscock sarcastically questioned whether the remedy was sufficient to allow consumer redress and to deter violators:

> Now, then, let us look at the only remedy that the bill affords to an oppressed people.
>
> ....
>
> A person sues the corporation or the combination or party to the combination. . . . The middlemen will never commence these actions. I mean the parties who in the first instance purchase of the combination. That will be guarded against, and the people who are to suffer the damages are those who are distributed all over this broad land, the consumers of the merchandise/buying perhaps a hundred dollars' worth and damages possibly $10, and they have the right to follow this combination or a party to it wherever he is domiciled and recover twice the amount of damages they have sustained! 21 Cong. Rec. 2571 (1890).

See also id., at 3147-48 (1890) (Sen. George).

The requirement of jurisdictional amount was eliminated in antitrust damages actions, for example. Senator Sherman explained that this was intended to permit suit by plaintiffs with small claims such as the individual consumers for whom Senators George and Spooner had expressed concern: "Those words were inserted with a view to giving a remedy to persons who had suffered in a minor degree."[5] 21 Cong. Rec. 2612 (1890). *Accord, id.*, at 3148-49.

There were a variety of proposed amendments which, though they were ultimately rejected, demonstrate further

[5] Senator Teller's argument in favor of waiving the jurisdictional amount demonstrates that this provision was bottomed on the desire to facilitate the claims of the individual consumer who, of course, purchased through a middleman:

> We want to give the United States courts jurisdiction without reference to the amount involved. It is the subject-matter simply that we want the court to have jurisdiction of, and not the amount, and if we limit the amount there is not one man out of a hundred who are damaged who will ever have an opportunity of getting redress. It may be that there will not be a case prosecuted where there is a large amount of damage. . . . I think we had better let the parties go into court on any amount. If they are damaged by these proceedings which we are about to declare illegal, they ought to be allowed to sue, no matter what the amount of damage may be.

the congressional intent to extend a remedy to the individual consumer who necessarily purchased from the great trusts through middlemen. Senator Reagan, for example, twice offered amendments to vest state courts with concurrent jurisdiction to entertain claims under the predecessor of section 4. *Id.*, at 2612, 3146. The purpose behind this amendment was that "[m]en of ordinary means (and that is the class of men who are usually subjected to wrongs of this kind) would not be able to employ lawyers and to take witnesses to the circuit court of the United States, and perhaps travel a great distance to reach there, in order to prosecute a suit for a few hundred dollars." *Id.*, at 3146. Though Senator Reagan's amendment was rejected, the rejection was solely because of doubts over the federal power to vest state courts with jurisdiction to hear federal penal actions and there was never any suggestion that the federal courts could not entertain suit by "men of ordinary means" who purchased from price-fixers through middlemen. *Id.*, at 3146-47. Other proposals to broaden the consumers' right to recover were rejected on a variety of grounds (*e.g.*, *id.*, at 3148), but never was there any suggestion that a consumer be barred from suit or that recovery be denied because the plaintiff did not deal directly with the price-fixer. Any such suggestion would have been contrary to the manifest congressional purpose of helping the consumer recover for the injury caused by the trusts.

Contrary to petitioners' narrow interpretation, therefore, the proponents of the forerunner of section 4 contemplated that plaintiffs such as the State of Illinois who had purchased through middlemen would be entitled to bring suit to recover for their injuries.[6] Since this Court

[6] The most recent Congress has interpreted section 4 to allow claims by persons who purchased through middlemen. While the interpretation by the 94th Congress is not, of course, contemporaneous legislative history of either section 7 of the Sherman Act or section 4 of the Clayton Act, it is an interpretation of section 4 by a coordinate branch of government to which this Court should give appropriate deference.

In Pub. L. No. 94-435 (Sept. 30, 1976), Congress enacted a new section 4C of the Clayton Act to overrule in part this Court's decision in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), and to empower State Attorneys General to sue as parens patriae to recover damages on behalf of citizens of their respective States. The language of section 4C closely parallels that of section 4. Specifically, section 4C provides for monetary relief "for injury sustained by . . . natural persons to their property by reason of any violation of the Sherman Act." The Senate version did not require "injury to property" but the House of Representatives insisted upon the language ultimately enacted to retain "traditional elements of private recoveries." Statement of "Appropriate Legislative Intention," Representative Peter W. Rodino, Sept. 16, 1976, *reported in* CCH Trade Reg. Rep. No. 249, ¶ 350.10 (Oct. 6, 1976). In adopting the language from section 4, Congress intended to allow recoveries by injured persons who did not purchase directly from the price-fixers:

> Thus, assuming the State attorney general proves a violation, and proves that an overcharge was "passed on" to the consumers, injuring them "in their property"; that is, their pocketbooks — recoveries are authorized by the compromise bill whether or not the consumers purchased directly from the price fixer, or indirectly, from intermediaries, retailers, or other middlemen. The technical and procedural argument that consumers have no "standing" whenever they are not "in privity" with the price fixer, and have not purchased directly from him, is rejected by the compromise bill. Opinions relying on this procedural technicality . . . are squarely rejected by the compromise bill. *Ibid.*

Congress used the language of section 4 because it understood that language to allow recoveries by plaintiffs who purchased through middlemen rather than directly from the price-fixers. That is an interpretation of section 4 to which this Court should give appropriate deference.

should apply the antitrust laws "in light of . . . the economic realities with which its framers were concerned," *Federal Trade Commission v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968), the State of Illinois should not be denied the opportunity to prove its damages.

* * * *

III

THE CONGRESSIONAL POLICIES REFLECTED IN THE ANTITRUST LAWS WILL BE ADVANCED BY ALLOWING ALL PURCHASERS OF UNLAWFULLY PRICED PRODUCTS TO RECOVER FOR THEIR INJURIES UNDER APPROPRIATE STANDARDS

A. Allowing All Purchasers of Unlawfully Priced Products the Right to Recover Their Provable Damages Will Encourage the Private Enforcement of the Antitrust Laws.

Private enforcement of the antitrust laws serves the dual purpose of providing a deterrent to antitrust violators and compensating those injured by reason of antitrust violations. *E.g., Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139-40 (1968). If all purchasers of unlawfully priced products were entitled to bring suit, then both purposes would be best served because the maximum deterrence would be provided and the competing claimants could share any recovery proportionate to their respective injuries. If only those in actual privity with the price-fixers were allowed to sue, however, both purposes would be ill-served because such parties would often have affirmative reasons for not bringing suit and, even if they did sue, they would often recover windfalls at the expense of subsequent purchasers in the chain of distribution who most likely bore the full measure of any overcharge.

Those who purchase directly from price-fixers are an improbable group upon whom to place the entire responsibility of private antitrust enforcement. As Senator George noted, those who purchase directly from price-fixers may actually profit by the continuance of the conspiracy through their own mark-up pricing practices. In any event, their business relationships with their suppliers would certainly be threatened if they were to sue their suppliers for price-

fixing. In *In re Western Liquid Asphalt Cases*, 487 F.2d 191, 198 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974), the Ninth Circuit cited such reasons as the explanation for the general failure of the immediate purchasers to sue those who had fixed the price of liquid asphalt:

> It is understandable that contractors might not sue, in view of (1) their alleged dependence upon appellees for their supply of asphalt, (2) the possibility that they earned a percentage profit on the overcharges, and (3) the control and interdependence alleged between appellees and the contractors. Thus if the present appellants could establish antitrust violations but were precluded from recovering, no one else would sue, and appellees would retain their assumedly illegal profits.

In the name of deterrence, this Court has rejected holdings which would allow "those who violate the antitrust laws by price fixing or monopolizing [to] retain the fruits of their illegality because no one was available who would bring suit against them." *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968). So, too, should this Court reject a holding which would limit relief to those in privity with the wrongdoers because such a group might well have affirmative reasons for not bringing the wrongdoers to the bar of justice. *See generally* Wheeler, *Antitrust Treble Damage Actions: Do They Work?* 61 Cal. L. Rev. 1319 (1973).

Deterrence is not the only end to be served by private antitrust enforcement. As petitioners themselves correctly note, "If deterrence were the only objective, then in logic any plaintiff willing to file a complaint would suffice." Pet. Br. 16 *quoting Bangor Punta Operations, Inc. v. Bangor & Aroostook R. Co.*, 417 U.S. 703, 717 (1974). The need to compensate those injured by antitrust violations also determines who is entitled to bring suit under section 4. To afford adequate compensation, all injured parties should have the right to bring suit. Recovery certainly should not

be limited to those which as a group are the least likely to have been injured by unlawful overcharges.

The original debates on the Sherman Act recognized that the injury caused by price-fixing was not necessarily limited to those who purchased from the price-fixers for resale. As Senator George argued, "An advance in the price to the middleman is not mentioned in the bill for the obvious reason that no such advance would damnify them; it would rather be of benefit, as it would increase the value of the goods he has on hand." 21 Cong. Rec. 1767 (1890). The decisions in the lower courts bear out Senator George's analysis. Both the lower courts[16] and potential claimants[17] recognize that those who purchase for resale intend a profit for their endeavors and therefore

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[16] *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 34 (3d Cir. 1971); *In re Master Key Antitrust Litigation*, 1973-2 Trade Cas. ¶ 74,680 at 94,980 (D. Conn. 1973).

[17] In *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 746 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1075 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971), for example, the District Court found that the first purchasers were often unwilling even to share in a recovery because they knew they had not been injured:

> The attitude of the members of the wholesaler-retailer class indicates no real damage to them.
>
> . . . [A]bout 1500 members excluded themselves from the class. We are told by those opposed to the present allocation that 'some 1,500 claim forms [were] returned with statements by druggists that they were not damaged[d] [sic] and therefore wished to make no claim.' Several such statements by druggists were read into the record (SM 371-374). Typical is this statement from a druggist in Wisconsin (SM 372):
>
> > Any pharmacy claiming damages is, in my opinion, guilty of lying. All pharmacies base their retail prices for drugs on their costs, either using a fixed percentage or a professional fee. Either way, they do not suffer damages due to higher wholesale costs of these drugs. If anyone has a complaint, it would be the individual consumer, not the pharmacists.

seek to recover any overcharges they pay from their customers.

None of this is to say, however, that only the last purchaser should be entitled to sue under section 4 or that persons who purchase for resale should never be allowed to assert claims. Wooden rules of that sort confuse the right to assert a claim with proof of damages and would not accomplish the stated purpose of section 4 to allow recovery for "injur[y] in . . . business or property." Rather, all parties within the target area should be afforded the right to present evidence of their damages.

* * * *

APPENDIX C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-404

ILLINOIS BRICK COMPANY, ET AL.,

Petitioners,

vs.

STATE OF ILLINOIS, ET AL.,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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• • • •

In our view, under any version of a proximate cause test that takes account of the purposes of the treble damages provision of Section 4, respondents should be entitled to attempt to prove that they were damaged as a result of petitioners' acts. This follows directly from the language of Section 4, from its purposes, and from this Court's indications that it should be construed to carry out those purposes. This conclusion also is supported by this Court's decision in *Hawaii* v. *Standard Oil Co., supra,* and by the recently enacted Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94—435, 90 Stat. 1383, 1394-1395.

In *Hawaii* this Court indicated that States and their subdivisions may recover for losses, caused by antitrust violations, they suffer in their role as consumers of goods and services (405 U.S. at 263 n. 14, 264). States usually consume or use goods and services in the manner of respondents in this case: they purchase them through intermediaries, such as wholesalers or contractors. *Hawaii* therefore endorses, at least implicitly, recovery by indirect purchasers.

So, too, does Congress. The Antitrust Improvements Act allows States to sue as *parens patriae* for damages inflicted by antitrust violations upon consumers within the State. Because consumers rarely purchase goods directly from the antitrust violators (unless there is a conspiracy among retailers), the promise of the Antitrust Improvements Act would be illusory unless Section 4 of the Clayton Act authorizes recovery for the losses inflicted upon indirect purchasers. The legislative history of the *parens patriae* provisions contains no evidence that Congress thought that it was authorizing the States to sue in a *parens patriae* capacity only where consumers were direct purchasers. To the contrary, Congress assumed that in-

direct purchasers may recover.[12] In light of this congressional decision to expand the recovery of damages for losses inflicted upon consumers, the Court should construe Section 4 of the Clayton Act in a way that advances rather than defeats the evident purpose of this recent legislation.

* * * *

[12] The Ninth Circuit had held, in a widely-discussed opinion, that indirect purchasers may recover for proven losses caused by antitrust violations. *In re Western Liquid Asphalt Cases*, 487 F. 2d 191, certiorari denied *sub nom. Standard Oil Co.* v. *Alaska*, 415 U.S. 919. Congress evidently was familiar with this case; the major committee reports assumed that it correctly stated the law. See H.R. Rep. No. 94-499, 94th Cong., 1st Sess. 6 n. 4 (1975); S. Rep. No. 94-803, 94th Cong., 2d Sess. 44 (1976). One of the major sponsors of the Act stated that consumers could recover damages whether or not they purchased directly from the price-fixer. See 122 Cong. Rec. H10295 (daily ed., September 16, 1976) (remarks of Rep. Rodino).

APPENDIX D

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-404

ILLINOIS BRICK COMPANY, ET AL.,
Petitioners,

vs.

STATE OF ILLINOIS, ET AL.,
Respondents.

PETITION FOR REHEARING.

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Without the barest support in the record, the majority asserts that direct purchasers have a larger stake in suing antitrust violators "for the full amount of the overcharge," and are more likely to sue than indirect purchasers.* (Slip Op. 22.) This assertion is fanciful at best. It is beyond dispute that states and political subdivisions have spearheaded antitrust enforcement over the last twenty-five years, recovering substantial damages for public agencies in lawsuits that are now prohibited. A fair review of recent criminal antitrust indictments** shows that public agencies have been the victims of hard-core price-fixing conspiracies among the manufacturers of a wide range of products purchased by schools, hospitals and other institutions.

• • •

The claims by states and political subdivisions in numerous pending actions will be seriously diminished or destroyed.

• • •

The majority ignores this adverse impact upon antitrust enforcement. Instead, it expresses the unfounded belief that its opinion will encourage suits by direct purchasers, because it makes their recovery easier, and thereby contribute to antitrust enforcement. The most cursory reference to the "real economic world" belies such an assertion.

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*In an effort to bolster this conclusion, the majority claims that indirect purchasers have such a small stake in class actions that "only a small fraction would be likely to come forward to collect their damages." (Slip Op. 23-24, citing Milton Handler.) But there has been no showing that a larger fraction of direct purchasers would ever claim damages. Experience in class actions, including this one, shows the opposite to be true.

**Compare discussion of cases selected by Milton Handler Slip Op. 17, n. 23.

First, the contractors who are now given the sole right of action to sue manufacturers of building materials are themselves a most notorious group of antitrust violators. A review of recent indictments by the federal government discloses numerous cases against contractors and other suppliers for collusion and bid rigging on public projects. (A list of representative indictments is attached as Appendix A.)

The widespread incidence of illegal practices by contractors makes a farce of the result in this case. The contractors could hardly be expected to initiate antitrust actions against their suppliers and expose themselves to broad civil discovery. Even if such contractors had not violated the law, or were not under investigation, it is unlikely they would want their business practices subject to public scrutiny.*

Second, many direct purchasers, such as franchisees and retailers, are dependent upon manufacturers for their continued existence. Not many small businessmen would risk retaliation from their suppliers by filing suit, especially since they have uncertain recourse if terminated as a result of bringing a treble damage action. In this connection, it is significant that three days after the *Illinois Brick* decision, Exxon announced that it would no longer sell fuel oil directly to consumers, but only through local distributors. (See Appendix B.) This action, of course, eliminates its exposure to antitrust suits such as *City of Philadelphia* v. *American Oil Co.*, 53 F. R. D. 45 (D. N. J. 1971), where states and other public entities recovered substantial damages from oil companies for price fixing.

Third, experience has shown that since middlemen are not hurt *as a matter of fact*, they do not have a sufficient

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*Collusion at the contractor or middleman level means that the states and public agencies often pay the full amount of the overcharge imposed by the manufacturers, plus the higher markup exacted by contractors on rigged bids.

stake to risk the consequences of a lawsuit. In the *Master Key Antitrust Litigation*, M. D. L. Docket No. 45 (D. Conn.), for instance, contractors did not sue because the evidence was clear that they simply passed on the illegal overcharge, plus their percentage markups.

There is no credible evidence that turning the *Hanover Shoe* rule against all suits by indirect purchasers will assist antitrust enforcement. Indeed, it is corporate defendants who have sought to use the *Hanover Shoe* rule as a shield against meaningful antitrust enforcement, just as the defendants have accomplished in this case. Since the decision so completely devastates the ability of public agencies to bring treble damage actions, the majority's action can only be explained as a means to protect corporate malefactors from liability and insulate business from having to answer for their admittedly unlawful conduct, leaving victims of price fixing without redress. The majority's bias against antitrust enforcement appears from its recital of arguments by biased commentators such as Milton Handler, a strident lobbyist for big business, whose articles reflect the narrow financial interests of corporate clients charged with antitrust law violations. It is more reasonable to expect that the Solicitor General of the United States and the Attorneys General of the fifty states, who have a duty to protect the public interest, could better express what course would best serve effective private antitrust enforcement.

In short, the *Illinois Brick* decision will cause the opposite result from what the majority says it wants to accomplish. Accordingly, the decision should be reversed.

* * *

REPLY

BRIEF

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No. 87-1862

In The

Supreme Court of the United States

October Term, 1987

STATE OF CALIFORNIA, *et al.*,

vs. *Appellants,*

ARC AMERICA CORPORATION, *et al.*,

Appellees.

On Appeal From The United States Court Of Appeals For The Ninth Circuit

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No. 87-1862

In The

Supreme Court of the United States

October Term, 1987

STATE OF CALIFORNIA, *et al.*,

vs. *Appellants,*

ARC AMERICA CORPORATION, *et al.*,

Appellees.

On Appeal From The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF OF APPELLANT STATES

SUMMARY OF ARGUMENT

The briefs of appellees and supporting *amici* are largely irrelevant to the preemption question presented by this appeal. This case is not *Illinois Brick* in another guise. The scope of federal remedies available under § 4 of the Clayton Act has already been decided. The central question presented by this appeal is whether Congress, having established remedies for violations of federal law, intended thereby to preclude states from enacting additional, supplemental remedies on behalf of downstream victims of anticompetitive conduct for violations of similar state laws.

Contrary to the assertions of appellees, the legislative history of the federal antitrust laws is central to the resolution of this question. Further, there is no new, special rule of preemption analysis for this appeal which requires that states demonstrate that they have been given permission to exercise their police powers to protect their citizens.

The possibility that federal courts may occasionally hear cases involving claims based on states' laws does not render those states' laws unconstitutional. Neither is there any basis for the assertion that Congress intended to preclude states from enacting remedies for the benefit of those injured in fact by conduct made illegal by federal and state law. The remedies at issue in this appeal are fundamentally consistent with the purposes of Congress, and are therefore valid under the supremacy clause of the Constitution.

ARGUMENT

I. THIS PREEMPTION CASE IS NOT *ILLINOIS BRICK* IN ANOTHER GUISE.

Appellees submit that this case is simply *Illinois Brick* in another guise. Answering Brief of Appellee ARC America Corp. at 19-47 (hereinafter cited as ARC Brief). Appellees misunderstand the issue presented by this appeal. The issue in this appeal is *not* the scope of remedies available under § 4 of the Clayton Act. That question was decided by the thoughtful opinion of Justice White writing for the Court in *Illinois Brick Company v. Illinois*, 431 U.S. 720 (1977), and subsequently developed in later opinions of this Court, notably *Blue Shield of*

Virginia v. McCready, 457 U.S. 465 (1982) and *Associated General Contractors v. Carpenters*, 459 U.S. 519 (1983). The issue in *this* case is whether Congress, having authorized a remedy for those who purchase directly from price-fixers, *also* intended to preclude states from providing remedies under state law for demonstrably injured downstream victims of anticompetitive conduct.

Although this Court carefully assessed the intent of Congress in *Illinois Brick*, that decision dealt solely with the scope of federal remedies under § 4 of the Clayton Act. In *Illinois Brick*, this Court was asked to choose between two options for the federal § 4 remedy: (1) overrule *Hanover Shoe* in order to permit recoveries under § 4 by a potentially large group of admittedly injured plaintiffs, or (2) limit the § 4 remedy to a smaller group of direct purchasers thereby increasing their incentives to enforce the federal antitrust laws. But *this* case presents two entirely different options for consideration by this Court. These are: (1) preemptively extend the direct purchaser limitation of federal law to state law, or (2) allow federal and state remedies to co-exist within the federal system.

This choice cannot be based on reflexive restatements of the holding of *Illinois Brick* as suggested by appellees. Fundamentally different principles must be applied in this case. Consistent with the supremacy clause jurisprudence of this Court, this choice requires a careful assessment of the evidence, if any, of the preemptive intent of Congress. Unless the evidence of preemptive intent is "clear and manifest", the downstream purchaser remedies of states' antitrust laws are valid. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

II. DIRECT EVIDENCE OF CONGRESSIONAL INTENT CANNOT BE IGNORED IN DETERMINING THE VALIDITY OF THE STATE DOWNSTREAM PURCHASER REMEDIES AT ISSUE IN THIS APPEAL.

Appellees assert that statements by the sponsors of the Sherman and Clayton Acts in support of a substantial state role in antitrust enforcement are irrelevant because the commerce power in 1890 and 1914 was considered to be narrower than it is today. ARC brief at 41-42. Appellees continue that since state and federal enforcement systems were unlikely to overlap under older conceptions of the Commerce power, statements like that of Senator Sherman that federal law was a "supplement" to state law, 21 Cong. Rec. 2547 (1890), are simply legislative *dicta*.[1] Such a stunted view of the intent of the framers of the antitrust laws has been rejected by this Court. Indeed, appellees' argument would "transform a generous principle of judicial construction – namely the 'retroactive' expansion of the jurisdictional reach of the Sherman Act to the limits of an expanded judicial conception of the commerce power – into a transgression of the clearly expressed congressional intent not to intrude on the

[1] Senator Sherman's views on the scope of the Commerce clause were in fact quite modern. Senator Sherman made clear that in his view the federal Commerce power extended to regulation of activities which affected interstate commerce. 21 Cong. Rec. 2461-2463 (1890). For this reason, the original draft of the Sherman bill applied federal antitrust law to trade restraints "which tend, to advance the cost to the consumer of any" articles in interstate commerce. S. 1, 51st Cong., 1st Sess. § 1 (1889).

regulatory authority of the States." *Cantor v. Detroit Edison Co.*, 428 U.S. 637 (1976) (Stewart, J. dissenting). This court has consistently determined that the Sherman Act was intended to have very limited preemptive effects. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978); *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96 (1978). And Congress has consistently premised legislation which post-dates modern decisions on the scope of the Commerce power on the idea that antitrust is fundamentally an area of shared power between federal and state authorities. 15 U.S.C. § 15f (federal antitrust authorities required to cooperate with state prosecutors); 42 U.S.C. § 3739 ($30 million authorized for state antitrust enforcement). When Congress determines to alter this traditional relationship, it does so explicitly. *See* National Cooperative Research Act of 1984, 15 U.S.C. (Supp. IV) § 4303(c).

The only point of interest for appellees in the seminal congressional debates on the Sherman Act is the idea that Congress sought to codify the common law of trade restraints. ARC Brief at 14-17. They then point to an historical text to suggest that a particular common law principle as elucidated in that text in 1888 would have precluded recoveries by downstream victims of illegal conduct. *Id.* at 17 n.11.[2] This again misses the point. The

[2] Insofar as contemporaneous common law doctrines can be incorporated by reference into the congressional policies of 1890, it is worth noting that the same text embraced by ARC states a few lines after the cited quote that: "(i)f the original act was wrongful, and would naturally, according to the ordinary course of events prove injurious to some other person or persons, and does actually result in injury through the

(Continued on following page)

issue is not whether Congress chose to adopt the common law of trade restraints, or what common law principles were intended to be incorporated into the new federal scheme, but whether Congress intended to create a pre-emptive system of federal law. On this issue – the key point of this appeal – appellees are apparently unable to marshal any support in the legislative record of the Sherman Act.

Appellees also characterize the debates of Congress on the Hart-Scott-Rodino Act as irrelevant. ARC brief at 13-14. The views of a subsequent Congress cannot be considered dispositive of the views of a previous Congress. *Illinois Brick*, 431 U.S. at 733-734 n. 14. States do not contend otherwise. Rather, states pointed to the Hart-Scott-Rodino Act debates and reports to demonstrate the consistent support of Congress for state antitrust enforcement efforts and an absence of congressional hostility to remedies for downstream purchasers. Likewise, the decision of Congress to allow the District of Columbia's downstream purchaser remedy to become law also demonstrates the consistent view of Congress on the appropriateness of the remedies at issue in this case.

(Continued from previous page)

intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing by those who were innocent." Cooley, Law of Torts 76 (2d ed. 1888). This latter common law principle is consistent with the legislative history of the Sherman Act. See e.g. 21 Cong. Rec. 1767 (1890) (Senator George). In any event, *Illinois Brick* did not turn on the idea that Congress had precluded recoveries by downstream purchasers in 1890, but that federal enforcement policies outweighed competing, but well recognized, compensation policies in § 4 proceedings. *Illinois Brick*, 431 U.S. at 746.

Unable to find affirmative support in the legislative record for their position, appellees argue that the failure of Congress to reject the rule of *Illinois Brick* in § 4 actions is dispositive of the preemption question presented by this appeal. ARC Brief at 46, n. 35; Brief of *Amicus Curiae* Chamber of Commerce at 25-29. This inaction by Congress does not lend support to appellees' argument, but rather is indicative of Congress' lack of preemptive intent.

Appellees correctly note that Congress has indeed not passed legislation to overrule *Illinois Brick*. What appellees fail to mention, however, is that neither has Congress enacted legislation to preempt state statutes like those at issue in this appeal. Moreover, when Congress had the specific opportunity to veto a District of Columbia downstream purchaser remedy, it allowed that legislation to become law without objection. The only reasoned conclusion to be drawn from this history is that Congress is satisfied with the rule of *Illinois Brick* at the federal level and does not object to downstream purchaser remedies at the state level, if states choose to provide such a remedy.

III. APPELLEES PRESS A RADICALLY NEW PREEMPTION JURISPRUDENCE ON THIS COURT.

Appellees' arguments turn on a radically new preemption jurisprudence. To prevail, ARC would have this Court both (1) completely reverse the traditional burden of proof in preemption cases and (2) dramatically expand the scope of the implied preemption doctrine.

With respect to who bears the burden of proof in a preemption case, ARC derives a new rule of preemption from the language in *Illinois Brick* that "on balance, and until there are clear directions from Congress to the contrary, we conclude that the legislative purpose in creating a group of " 'private attorneys general' " under § 4, (citation omitted), is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them". *Illinois Brick*, 431 U.S. at 746. ARC argues that the "until there are clear directions from Congress" language has the effect of reversing the normal burden of proof in preemption cases and requires states to prove that they were given affirmative permission by the Congress to protect their citizens. ARC Brief at 4, 17. Under this test, congressional "silence" leads to the ouster of state law. ARC Brief at 41-47.

There are a number of obvious fallacies in this analysis. First, *Illinois Brick* was not a preemption case and the meaning ascribed to the Court's language by ARC defies the context within which it was used. Second, the imposition of the burden of proof in preemption cases on those who challenge state laws has been carefully developed by this Court over many years, and has its roots in the very earliest traditions of the Constitution. Tribe, American Constitutional Law 2d 479-496 (1988). The burden is unequivocally on those who challenge state law on preemption grounds to demonstrate that Congress has evinced a "clear and manifest" intent to oust state law. *Puerto Rico Dept. of Cons. Affairs v. Isla Petroleum*, 108 S.Ct. 1350, 1353 (1988). *See also Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707, 715 (1985); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Congressional "silence" or ambiguity requires the challenger to go to Congress and seek preemption of state law. *Id.*

Third, the quote itself, and particularly the phrase most crucial to ARC's analysis, indicates that Congress has not expressed a "clear and manifest" intent to preempt states' statutes. Insofar as ARC's argument depends on this language, it is clear that states' laws are valid. *Id.*

Not only do appellees seek to reverse the constitutional burden in preemption analysis, they seek to radically expand the implied preemption doctrine as well. ARC correctly notes that preemption can be inferred in some cases without reference to explicit evidence of congressional intent to oust state law.[3] However, ARC then makes the novel and unwarranted assumption that preemption can be implied contrary to direct evidence of congressional intent. ARC Brief at 41-47. This is

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[3] Appellees' citation to *Flood v. Kuhn*, 407 U.S. 258 (1972), in support of this proposition is not helpful. ARC Brief at 9; Brief of *Amicus Curiae* Chamber of Commerce Brief at 28-29. Supremacy clause preemption was not strictly an issue in *Kuhn* as the state law claim was disposed of on commerce clause grounds. *Kuhn*, 407 U.S. at 284-285.

However, *Kuhn*, unlike this case, illustrates a situation in which federal preemption might be inferred. The longstanding professional baseball exemption to the federal antitrust laws allowed for certain kinds of *conduct* thought essential to the game. The specific conduct challenged by plaintiff Curt Flood was the player reserve clause. To have allowed state antitrust law to apply to that conduct would directly frustrate the federal policy of authorizing this conduct. In this case, however, state and federal law establish identical prohibitions against price-fixing. There is no conflict with federal conduct standards. As a consequence, there is no basis for inferring a preemptive intent on the part of Congress.

completely at odds with the leading implied preemption decisions of this Court which have carefully assessed every available piece of evidence bearing on the allegedly preemptive intent of Congress. *See, e.g., CTS Corp. v. Dynamics Corp.*, 481 U.S. 69 (1987); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). In sharp contrast to the opening brief of appellant states, ARC has not, and apparently cannot, bring to this argument a single piece of direct legislative evidence to support its assertion that states' remedies are preempted.[4]

IV. THE LIMITED POSSIBILITY THAT STATE DOWNSTREAM PURCHASER CLAIMS MAY OCCASIONALLY BE HEARD BY FEDERAL COURTS DOES NOT RENDER STATES' DOWNSTREAM PURCHASER REMEDIES UNCONSTITUTIONAL

ARC asserts that the mere possibility that state downstream purchaser claims may, in limited circumstances, be heard in federal courts renders states' statutes

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[4] ARC's radically revised implied preemption jurisprudence also ignores the presumption developed over many years to protect state law from unwarranted ouster by implication. ARC asserts that even though a state statute represents an exercise of traditional state police power, it can still be preempted on a proper showing. ARC Brief at 9-10. States did not argue otherwise. What states did assert is that after states have exercised their traditional police powers in an area for an extended period of time, here over a century, or when state law provides a remedy to those who do not have one under federal law, the legal and common sense conclusion is that state law is valid unless and until Congress explicitly preempts it. *See CTS Corp. v. Dynamics Corp.*, 481 U.S. 69 (1987); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984).

unconstitutional. Once again, Appellees argument is premised on a misunderstanding of this Court's opinion in *Illinois Brick*.

Contrary to appellees' repeated assertions, *Illinois Brick* was not a preemption case. There this Court focused on the added complexities to § 4 lawsuits if downstream plaintiffs were permitted a federal remedy. 431 U.S. at 745. The Court did not determine that states were precluded from allowing downstream purchasers a right to recover provable damages under states' laws.

Appellant states have determined that providing a remedy to downstream purchasers will enhance the vigorous enforcement of states' antitrust laws. The mere fact that the states and Congress have chosen different means to accomplish the same purpose does not inexorably lead to the conclusion that states' statutes are preempted. That a state antitrust lawsuit may be more complex due to necessary pass-on determinations than a § 4 lawsuit is not a sufficient basis on which to premise a finding of preemption. "Questions of whether overcharges were passed on, essential to the indirect purchaser's (state law) claim are irrelevant to" a direct purchaser's § 4 claim. *Union Carbide Corp. v. Superior Court*, 36 Cal. 3d 15,23 (1984). Thus, appellees must do more than simply show that state proceedings may be more complex than § 4 proceedings. Appellees must show that the added complexity to state proceedings will stand as an obstacle to

the accomplishment of the federal purpose. This Appellees have not done.[5]

ARC appears to agree with states that the vast majority of state downstream purchaser actions will be heard by federal courts only to the extent that federal courts exercise their pendent law jurisdiction. ARC brief at 26-28. However, ARC inaccurately asserts that states are seeking to limit the jurisdiction of federal courts with state enactments. ARC brief at 29. Certainly states' downstream purchaser statutes have no such purpose or effect. Insofar as federal courts choose not to hear state claims based on concerns about the most effective use of their own resources or otherwise, such decisions will be grounded on federal policies not state law.

ARC points to the possibility that downstream purchaser actions may be heard on a diversity basis as a reason to oust the laws at issue in this appeal. The fact that a state downstream purchaser case might be

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[5] *Amicus* Chamber of Commerce seeks to derive a generalized, preemptive federal anti-complexity policy in antitrust from isolated statements during the debates on the Sherman Act. Chamber brief at 9-10. The Chamber quotes Senators Edmunds and Morgan to the effect that the Sherman Act was complicated enough without adding further complications. 21 Cong. Rec. 3148 (Senator Edmunds) & 3149 (Senator Morgan) (1890). Even out of context, these statements are so general as to have little probative value, and were so recognized in *Associated General Contractors v. Carpenters*, 459 U.S. 519, 543-544 n. 50 (1983). Moreover, these statements were made in debate on whether to amend the private remedy provision of the Sherman bill to provide for then largely theoretical class actions, and thus in their proper context do not support the proposition advanced by the Chamber. 21 Cong. Rec. 3148-3151 (1890).

ajudicated in a federal court because the parties are from different states do not frustrate the policies articulated in *Illinois Brick*. There this Court expressed concern with the impact of added complexity on § 4 actions, not on federal courts in general. In addition, diversity jurisdiction requires complete diversity. 28 U.S.C. § 1332; *Strawbridge v. Curtis*, 7 U.S. (3 Cranch) 267 (1806). The more significant a state antitrust action becomes in terms of the number of parties involved, the less likely that complete diversity, and mandatory federal jurisdiction, can be established. At best, the impact on the federal system of state antitrust actions being heard on a diversity basis is minimal. Appellants do not understand appellees to be asserting that an otherwise valid state law becomes unconstitutional because in limited circumstances claims based on that law might be heard in federal courts. Such a novel claim would turn diversity jurisdiction into an unintended enemy of federalism.

V. THE SETTLEMENT FUND AT ISSUE IN THIS APPEAL WAS CREATED BY THE COMPROMISE OF STATE AND FEDERAL CLAIMS.

ARC implies that the settlements which gave rise to this appeal were created for the exclusive benefit of direct purchasers claiming under § 4 of the Clayton Act. ARC Brief at 31-33. Based on this premise, ARC argues that any recovery by downstream victims of the cement price-fixing scheme challenged in the underlying litigation represents an unlawful and inequitable taking from ARC and its co-appellees. The compromise of states' massive claims for indirect purchases of cement were an essential prerequisite to all of the settlements. Jt.App. 76-77. This is

not a case in which states have made conflicting claims upon a single fund created solely for the benefit of direct purchasers. *Cf. Western Union Co. v. Pennsylvania*, 368 U.S. 71 (1961). Rather, the underlying reality of this case is that direct purchasers are attempting, so far successfully, to convert to their own purposes those portions of these settlements which are based on the compromise of states' downstream purchaser claims.[6]

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[6] ARC disingenuously asserts that direct purchasers may recover less than their actual damages because of the claims of downstream purchasers. ARC brief at 30-31. In fact, any such result is a consequence of the choice of direct and indirect purchasers to settle with certain defendants rather than fully litigate this case.

The alleged complexities ARC associates with states' downstream remedies also arise from the unique facts of this settlement. At the time the settlements were accepted by the trial court, the court did not require an agreed upon apportionment between federal and state claims. This creates the possibility that the trial court on remand will have to allocate the settlement funds between state and federal claimants. As states noted in their opening brief, this process need not be complex. States' Opening Brief at 36-37.

The possibility of a federal "pass-on trial", ARC Brief at 22-26, is remote, at best, in this case because there is no evidence that direct and indirect claims overlap. Moreover, a federal pass-on trial is not generally a consequence of states' downstream purchaser remedies, the general validity of which are at issue in this appeal. *Crown Oil Corp. v. Superior Court*, 177 Cal.App.3d 604, 223 Cal.Reptr. 164 (1986) *rev. denied* 177 Cal.App.3d 614 (Cal. Sup. Ct. 1986), *app. dism. sub nom. Crown Oil Corp. v. Lapidus Popcorn, Inc.*, 479 U.S. 879 (1986).

VI. THERE IS NO EVIDENCE OF A PREEMPTIVE CONGRESSIONAL POLICY SHIELDING ANTITRUST VIOLATORS FROM PAYING FOR THE INJURIES THEY IN FACT CAUSE.

ARC inaccurately asserts that any payment to downstream victims of anticompetitive conduct under state law conflicts with an asserted congressional policy against what ARC characterizes as duplicative liability. There is, according to *amicus curiae* National Association of Manufacturers, a congressional policy which shields NAM members from "potentially ruinous multiple liability in separate suits by direct purchasers under the Clayton Act . . . and by indirect purchasers under the state laws at issue here." *Amicus Curiae* Brief of National Association of Manufacturers at 2. Neither points to a single piece of legislative history to support this assertedly preemptive congressional policy. What appellees and their *amici* rely on, although they muddy the distinction, are two separate bases for this asserted preemptive policy. These are (1) the policy against one plaintiff recovering for the injuries sustained by another first articulated by the Court speaking through Justice Marshall in *Hawaii v. Standard Oil Co.*, 405 U.S. 82 (1972) and (2) an implied limit on the total exposure of an antitrust violator under federal and state law to what is recoverable under § 4 of the Clayton Act.

With respect to *Hawaii v. Standard Oil Co.*, it is clear that the Court was construing federal law, not the relationship between federal law and state law. *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972). Whatever the reach of this policy, it is not implicated in this case. Recoveries under the state statutes at issue here are measured by the

injuries actually sustained by a downstream purchaser. Since a state plaintiff is not authorized to recover for the injuries sustained by another, this policy is not offended or affected by states' downstream purchaser remedies.

With respect to the assertedly implied limit on what states can do for demonstrable victims of anticompetitive conduct based on what can be recovered by federal plaintiffs under § 4, ARC has not pointed to any evidence that Congress intended that it's choice of a certain remedy at the federal level also constituted a decision to preempt state remedies. No such intent can be inferred from the text or legislative history of the federal antitrust laws.

The assertion by the Chamber of Commerce that the states' downstream purchaser remedies will produce impermissible "overdeterrence", Chamber Brief at 20-21, suffers from two additional errors. First, the conclusion that "overdeterrence" can be caused at all assumes that Congress has determined what the "appropriate" level of deterrence for *both* the federal and state antitrust systems should be. That assumption is devoid of any support in the legislative history of the federal antitrust laws. In the absence of any evidence that the Congress has attempted to determine an appropriate level of deterrence for the states, the states' decisions to provide different or additional levels of deterrence must be respected. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984); *California v. Zook*, 336 U.S. 725 (1949). Indeed, since a number of studies indicate that price-fixing remains profitable despite the federal treble damage remedy, ARC has not even presented an effective case for its position irrespective of the intent of Congress. *See, e.g.*, Parker, *Treble Damage Actions*

– A Financial Deterrent To Antitrust Violations?, 16 Antitrust Bull. 483 (1973); Erickson, *The Profitability Of Violating The Antitrust Laws: Dissolution and Treble Damages In Private Antitrust Litigation*, 5 Antitrust L. & Econ. Rev. 101 (1972).

Second, the very fact that Congress provided a treble damage remedy at the federal level suggests that it is not unalterably opposed, much less preemptively opposed, to the possibility that wrongdoers may suffer more than they stand to gain from their unlawful conduct. There is simply no basis in the legislative record for the proposition that a price-fixer, by entering into an unlawful conspiracy, should not be assumed to have accepted the risk of disgorging more than the amount provided under § 4 of the Clayton Act for the benefit of injured victims of its illegal conduct.

VII. THE DOWNSTREAM PURCHASER REMEDIES OF STATES' LAWS DO NOT OBSTRUCT FEDERAL ANTITRUST LAW.

The central theme of *Illinois Brick* was the importance of effective and efficient enforcement of the federal antitrust laws. To that end, this Court empowered a particular class of antitrust victims to act as "private attorneys general" under § 4 of the Clayton Act and increased their financial incentives to act in the public interest. The downstream purchaser remedies of states' laws do not obstruct the standing of direct purchasers to act as "private attorneys general", nor do they impinge on the financial incentives which facilitates the enforcement role of direct purchasers in the federal scheme. In fact, the state remedies at issue in this appeal will advance enforcement

of federal and state prohibitions against price-fixing. And these remedies make it possible for the two-tiered system of state and federal antitrust law to compensate those injured in fact by anti-competitive conduct without losing the advantages of the enforcement mechanisms created by *Illinois Brick*.

CONCLUSION

For the reasons stated in this brief and in their opening brief, the States of Alabama, Arizona, California, and Minnesota respectfully ask the Court to reverse the decision below.

January 30, 1989

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AMICUS CURIAE

BRIEF

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No. 87-1862 (9)

In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF CALIFORNIA, ET AL., APPELLANTS

v.

ARC AMERICA CORPORATION, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

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QUESTION PRESENTED

Whether Section 4 of the Clayton Act, 15 U.S.C. 15, construed by this Court in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), to bar treble damage actions by indirect purchasers under the federal antitrust laws, preempts state indirect-purchaser statutes.

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INTEREST OF THE UNITED STATES

The United States has primary responsibility for enforcing the federal antitrust laws. This case presents the question whether the Clayton Act, which has been construed to provide no remedy to "indirect purchasers" in most cases, preempts state antitrust statutes that give a remedy to indirect purchasers. Because that question requires determination of congressional intent underlying federal antitrust laws enforced by the United States, and because the determination in this case may affect federal antitrust enforcement, the United States has a particular interest in its correct resolution.

STATEMENT

Beginning in 1976, 35 actions were filed in 12 federal district courts against a number of cement manufacturers,

alleging a nationwide conspiracy to fix prices (J.S. App. A3). Appellants—California, Minnesota, Alabama, and Arizona—filed four of those actions. Each State sought to represent a class that included all governmental entities within the State that had purchased either cement or products containing cement (see *id.* at A73, A94, A110-A111, A127). The States' complaints alleged violations of Section 1 of the Sherman Act, 15 U.S.C. 1, and state statutes. California, Minnesota, and Alabama sought recovery for indirect purchases of cement, basing their claims on state statutes that indisputably permit indirect-purchaser suits.[1] Arizona made a similar claim,[2] but the question whether its statute permits indirect-purchaser suits is disputed (J.S. 9).

In September 1977, the Judicial Panel on Multidistrict Litigation transferred all pending actions to the District of Arizona for coordinated pretrial proceedings (J.S. App.

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[1] See J.S. App. A97 (citing Ala. Code § 6-5-60 (1975) ("[a]ny person * * * injured or damaged by an unlawful trust, combine or monopoly, or its effect, direct or indirect, may, in each instance of such injury or damage, recover the sum of $500.00 and all actual damages")); J.S. App. A116 (citing Cal. Bus. & Prof. Code § 16720 *et seq.* and a state unfair competition statute); see also Cal. Bus. & Prof. Code § 16750(a) (West 1987 & Supp. 1988) (action to recover "three times the damages sustained * * * may be brought by any person who is injured in his or her business or property * * * regardless of whether such injured person dealt directly or indirectly with the defendant"); J.S. App. A132 (citing Minn. Stat. §§ 325.8011-325.8028 (1978)); see also Minn. Stat. Ann. § 325D.57 (West Supp. 1988) ("[a]ny person * * * injured directly or indirectly * * * shall recover three times the actual damages sustained").

[2] See J.S. App. A80 (citing Ariz. Rev. Stat. Ann. § 44-1402); see also Ariz. Rev. Stat. Ann. § 44-1408 (1987) (the State or any other person "threatened with injury or injured in its business or property by a violation of this article may bring an action for * * * damages sustained").

A3). In March 1979, the district court certified the actions as class actions and established three classes of cement purchasers.[3] The second and third classes consisted, respectively, of California and Oregon and their political subdivisions. The first and broadest class was made up of all others who purchased cement during the relevant time period. *Ibid.*

Between July 1979 and October 1981, the three classes entered into a series of settlement agreements with seven of the major defendants, which produced a settlement fund of more than $32 million (J.S. App. A4).[4] The settlement agreements left distribution of the settlement fund for later resolution, subject to approval by the district court (*id.* at A4, A11).

By an order dated January 21, 1985 (J.S. App. A27-A33), the district court approved a plan distributing the settlement fund. In response to claims by the direct purchasers that the States could not be compensated for their indirect purchases of cement because of this Court's intervening decision in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), the district court disallowed the claims of indirect purchasers. It held, without further discussion, that the state statutes on which Alabama, California, and Minnesota were relying to recover for indirect purchases "are clear attempts to frustrate the purposes and objectives of Congress, as interpreted by the Supreme Court in *Illinois Brick*, and, accordingly, are preempted by federal law" (J.S. App. A30-A31).

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[3] The court also certified a fourth class, entities that purchased ready-mix concrete for delivery within the State of Arizona (J.S. App. A3).

[4] Pursuant to the settlement agreements, the plaintiffs released all claims, under state law or federal law, based on either direct or indirect purchases of cement. See, *e.g.*, J.S. App. A141, A153, A154-A155.

The Ninth Circuit affirmed (J.S. App. A1-A26). It first suggested (*id.* at A21) that the state indirect-purchaser statutes could be construed to limit direct purchasers' recoveries under federal law to the amount of any overcharge that the direct purchaser itself had absorbed—a construction that would "directly conflict with federal law." The court of appeals then concluded (*ibid.*) that, even if the state indirect-purchaser statutes were construed only as permitting indirect purchasers to bring claims in addition to the claims brought by direct purchasers, the indirect-purchaser claims asserted in this case would impermissibly interfere with the "policy goals" of *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick*. In particular, the court of appeals concluded that such claims would "complicate antitrust enforcement" (J.S. App. A21); "could also limit the recoveries of direct purchasers and thus reduce their incentives to bring antitrust actions" (*id.* at A22); and would "conflict most directly with federal policy because they create the risk of multiple liability for defendants" (*id.* at A22-A23). The court discerned in this Court's opinions "an express federal policy condemn[ing] multiple liability for antitrust defendants" (*id.* at A23). It concluded (*ibid.*) that, if state indirect-purchaser statutes were valid, then in certain circumstances (for example, if liability had been previously imposed under the state statute) the application of federal law could result in imposition of multiple liability in contravention of the holding of *Illinois Brick*.

SUMMARY OF ARGUMENT

In *Illinois Brick* and *Hanover Shoe*, this Court construed Section 4 of the Clayton Act, 15 U.S.C. 15, generally to preclude proof that the customer of an antitrust violator has passed on the overcharge to subsequent purchasers, and thus to preclude indirect purchasers from obtaining a treble damage remedy in most circumstances. We agree with those holdings, both as a matter of statutory interpretation and as a matter of antitrust policy. A number of the States have reached a different conclusion, however, and have afforded indirect purchasers a damage remedy under state antitrust laws. Such divergent state approaches are not preempted unless there is a clear indication that Congress intended to make federal antitrust liability exclusive.

The legislative history of the federal antitrust laws demonstrates a congressional intent to supplement, and not to displace, state antitrust enforcement. And Congress, as well as this Court, has repeatedly indicated in the years since a recognition that States enjoy broad authority to enact and provide for the enforcement of their own antitrust laws.

The court of appeals based its conclusion that state indirect-purchaser statutes are preempted on the policies articulated by this Court in construing Section 4 of the Clayton Act. But neither *Illinois Brick* nor *Hanover Shoe* involved state law; nor does either decision refer to any congressional intent to preclude the States from adopting their own approaches. The court of appeals improperly equated policies appropriately taken into account by this Court in construing a federal statute with an affirmative congressional intention to require the States to conform their statutory remedies to the federal model.

Thus, although this Court took account of the additional complexity that would be introduced into antitrust litigation by allowing proof that damages were passed on, as well as the deterrent effect of concentrating the right of recovery in the direct purchaser, no "irreconcilable conflict" (*Rice* v. *Norman Williams Co.*, 458 U.S. 654, 659 (1982)) with Congress's purposes would be created by allowing the States to adopt remedies that will make the

enforcement of their laws more complicated than related federal laws. The federal courts can refuse to exercise pendent jurisdiction over state claims if they will unduly complicate federal litigation (*United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725-726 (1966)), and in any event this Court's focus on the complexity of proceedings that would result if an ambiguous federal statute were interpreted a certain way does not suggest that state legislatures are powerless to enact unambiguous statutes that require complex proceedings for their enforcement.

Under the Supremacy Clause, state laws cannot affect the right of direct purchasers to recover under federal law. In any event, the court of appeals' concern about lessening the incentives of direct purchasers to bring suit was misdirected, because this Court's goal in *Hanover Shoe* and *Illinois Brick* was to enhance the deterrent effect of the antitrust laws, not to favor direct purchasers as such. The goal of deterrence is if anything probably furthered, not impeded, by permitting indirect purchasers to sue under state law.

Similarly, the risk of multiple liability, on which the court of appeals relied heavily, creates no basis for preemption. There is no indication that Congress intended to establish federal antitrust remedies as a ceiling on the total liability a defendant must pay as a result of its anticompetitive activity. Under established principles of preemption, state and federal jurisdictions can exact separate penalties for a single act.

ARGUMENT

CONGRESS DID NOT PREEMPT STATE STATUTES AFFORDING DAMAGE REMEDIES TO INDIRECT PURCHASERS

In *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), the Court concluded that Section 4 of the Clayton Act, 15 U.S.C. 15, does not permit indirect purchasers to recover

damages under that statute in most circumstances. We fully support that result, and agree that this construction of the federal Act best serves the goal of antitrust enforcement. But the States have independently considered the issue of recovery by indirect purchasers, and a number have reached a different conclusion.[5] Unless Congress has required, either explicitly or implicitly, that federal antitrust laws be the exclusive model for liability for anticompetitive activity, the States are free to adopt their own enforcement policies and remedies. Because we can discern no such intent on the part of Congress, we believe that, whatever one may think of the wisdom of affording antitrust remedies to indirect purchasers, the States are not precluded by federal law from pursuing such a course. The court below confused the policy considerations that properly informed this Court's construction of the federal statute with an affirmative congressional decision to preclude the States from pursuing different approaches.

A. Congress Did Not Intend to Interfere With the Broad Authority of the States To Enact and Enforce Antitrust Laws In Aid of Their Police Powers

1. In any preemption analysis, " '[t]he purpose of Congress is the ultimate touchstone.' " *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978); see also *Fidelity Federal S & L Ass'n* v. *De la Cuesta*, 458 U.S. 141, 152 (1982); *Schneidewind* v. *ANR Pipeline Co.*, No. 86-986 (Mar. 22, 1988), slip op. 6. Congress may explicitly define the extent to which its enactments preempt state law (see, *e.g.*, *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 95-96

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[5] At least 12 jurisdictions, in addition to California, Minnesota, and Alabama, have indirect-purchaser statutes that expressly give indirect purchasers standing to sue. Others have statutes that, like Arizona's, may be interpreted to permit indirect-purchaser suits. See U.S. Amicus Br. in support of appellants' Jurisdictional Statement 6 n.8.

(1983)), or it may indicate, either explicitly or implicitly, an intention to occupy a field to the exclusion of state law. And, even if Congress has not entirely displaced state regulation in a particular field, state law may be preempted to the extent it conflicts with federal law. See *Hines* v. *Davidowitz,* 312 U.S. 52, 67 (1941); *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 142-143 (1963); *Schneidewind* v. *ANR Pipeline Co.,* No. 86-986 (Mar. 22, 1988), slip op. 6-7.

Federal regulation will not be deemed to preempt state regulatory power, however, "in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained" (*Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. at 142). Courts may not seek out a conflict where none clearly exists, or concern themselves with hypothetical possibilities. *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117, 130-131 (1978); *Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440, 446 (1960). Moreover, if state regulation is in aid of the usual police powers of the State, there is a presumption that Congress did not intend to interfere with state regulation. *Jones* v. *Rath Packing Co.,* 430 U.S. 519, 525 (1977); *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. at 144-147; *California* v. *Zook,* 336 U.S. 725, 734 (1949); *Rice* v. *Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). "This assumption provides assurance that the 'federal-state' balance, *United States* v. *Bass,* 404 U.S. 336, 349 (1971), will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones* v. *Rath Packing Co.,* 430 U.S. at 525.

This Court's approach, "supported by decisions extending back to the turn of the century," is to temper any implied-preemption analysis "by the conviction that the proper approach is to reconcile 'the operation of both

statutory schemes with one another rather than holding one completely ousted.' " *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware,* 414 U.S. 117, 127 & n.8 (1973) (quoting *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 357 (1963)); accord *De Canas* v. *Bica,* 424 U.S. 351, 357-358 n.5 (1976). The Court therefore "is generally reluctant to infer preemption" (*Exxon Corp.* v. *Governor of Maryland,* 437 U.S. at 132).

2. Neither the Sherman Act nor the Clayton Act expressly preempts state antitrust laws and remedies. And it is well settled that Congress did not intend to displace state regulation of anticompetitive practices, which has traditionally been undertaken by the States in the exercise of their police powers (see L. Sullivan, *Antitrust* 155-156 (1977)).

In 1890, when the Sherman Act was enacted, 21 States had supplemented the common law with statutory antitrust legislation. See Mosk, *State Antitrust Enforcement and Coordination with Federal Enforcement,* A.B.A. Sec. Antitrust L. Proc., Aug. 6-10, 1962, at 358, 363; 21 Cong. Rec. 2456 (1890).[6] Congress acted because the various state laws were perceived as inadequate to deal with nationwide and regional anticompetitive combinations. See, *e.g.,* 21 Cong. Rec. 2456, 2457, 2459-2460, 2568 (1890). The Sherman Act was intended to complement the States' efforts to control "the great evil that now threatens us." 21 Cong. Rec. 2456-2457 (1890) (remarks of Sen. Sherman).

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[6] The federal statute that the court of appeals held has preemptive effect in this case, Section 4 of the Clayton Act, 15 U.S.C. 15, extends to victims of violations of any of the antitrust laws the remedy originally provided under Section 7 of the Sherman Act, 26 Stat. 210. See H.R. Rep. 627, 63d Cong., 2d Sess. 14 (1914). Section 7 of the Sherman Act was repealed in 1955 (Act of July 7, 1955, ch. 283, § 3, 69 Stat. 283) on the ground that it was no longer needed because Section 4 of the Clayton Act provides an equivalent remedy. See S. Rep. 619, 84th Cong., 1st Sess. 2-3 (1955).

Senator Sherman stated: "Each State can and does prevent and control combinations within the limit of the State. This we do not propose to interfere with." *Id.* at 2456. Congress's purpose was "to aid the States in declaring null and void these combinations and agreements in restraint of trade." 21 Cong. Rec. 2563 (1890) (remarks of Sen. Sherman). "No attempt [was] * * * made to invade the legislative authority of the several States or even to occupy doubtful grounds." H.R. Rep. 1707, 51st Cong., 1st Sess. 1 (1890).

Indeed, because of the narrow view of the federal government's Commerce Clause powers generally recognized in 1890 (see generally *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 632-637 (1976) (Stewart, J., dissenting)), Senator Sherman believed that a substantial number of conspiracies in restraint of trade would continue to be subject only to state regulation. See, *e.g.*, 21 Cong. Rec. 2462 (1890); see also *id.* at 4091, 4099 (Reps. Culberson and Bland stating that States had a duty to supplement the federal Act to cover anticompetitive activity outside the federal sphere); H.R. Rep. 1707, 51st Cong., 1st Sess. 1 (1890) (same statement). Congress's intent was simply "to arm the Federal courts within the limits of their constitutional power that they may co-operate with the State courts in checking, curbing, and controlling the most dangerous combinations." 21 Cong. Rec. 2457 (1890) (remarks of Sen. Sherman). Today, because of expanded interpretations of the Commerce Clause, the federal and state spheres overlap substantially. But to construe state remedies as preempted by federal remedies because of the expanded scope of the modern Commerce Clause would "transform[ ] a generous principle of judicial construction—namely the 'retroactive' expansion of the jurisdictional reach of the Sherman Act to the limits of an expanded judicial conception of the commerce power—into a

transgression of the clearly expressed congressional intent not to intrude on the regulatory authority of the States." *Cantor* v. *Detroit Edison Co.*, 428 U.S. at 637 (Stewart, J., dissenting).

In the years since 1890, Congress repeatedly has indicated its understanding that state antitrust remedies may coexist with federal antitrust remedies. For example, in considering the Capper-Volstead Act of 1921, 7 U.S.C. 291, 292 (which contains an exemption for agricultural cooperatives from federal antitrust laws, but no express preemption of state antitrust laws regulating such organizations), Congress indicated that it expected state law to continue to forbid some such cooperatives, notwithstanding the federal decision to permit them.[7] In more recent amendments to the Omnibus Crime Control and Safe Streets Act of 1968, Congress has provided seed money to the States to fund antitrust enforcement programs, thus recognizing the States' power to pursue such programs (see Act of Oct. 15, 1976, Pub. L. No. 94-503 Tit. I, § 116, 90 Stat. 2415). And, in still more recent legislation granting limited exemptions from the federal antitrust laws, Congress has chosen to preempt state antitrust remedies expressly. See National Cooperative Research Act of 1984, 15 U.S.C. (Supp. IV) 4303(c); Export Trading Company Act of 1982, 15 U.S.C. 4016, 4002(a)(7). These express preemption provisions reflect Congress's understanding that, in the absence of such provisions, the States would be free to pursue independent and potentially conflicting

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[7] H.R. Rep. 24, 67th Cong., 1st Sess. 2 (1921) ("In States where it is illegal to operate an association such as the ones permitted under this bill, it will * * * be practically impossible to operate under this legislation, as the bill only grants the right to operate in interstate and foreign commerce. That is the only power that Congress can confer upon such associations.").

private remedies. See S. Rep. 98-427, 98th Cong., 2d Sess. 14 (1984) ("[t]he protections afforded by title II to joint R&D programs from treble damages under Federal law would be largely vitiated by continuing treble damage exposure under State law").

This Court also has recognized the States' broad authority to legislate in the antitrust field. "That state legislatures have the right * * * to prevent unlawful combinations to prevent competition and in restraint of trade, and to prohibit and punish monopolies, is not open to question." *Waters-Pierce Oil Co.* v. *Texas,* 212 U.S. 86, 107 (1909) (citing *National Cotton Oil Co.* v. *Texas,* 197 U.S. 115 (1905), and *Smiley* v. *Kansas,* 196 U.S. 447 (1905)); see also *Watson* v. *Buck*, 313 U.S. 387, 403 n.6 (1941); *Southern Motor Carriers Rate Conf.* v. *United States,* 471 U.S. 48, 56 & n.19 (1985); *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. at 133; *Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 271 (1937) (criminal provisions of Sherman Act do not preempt similar Puerto Rican law); *Standard Oil Co.* v. *Tennessee,* 217 U.S. 413, 421-422 (1910) (upholding state antitrust law against claim that it interfered with interstate commerce).[8]

[8] In holding that Ohio's statutory scheme, which specifically precludes the application of any statute of limitations to antitrust suits under state law, was not preempted by the four-year statute of limitations in Section 4B of the Clayton Act, 15 U.S.C. 15b, one court of appeals remarked that, "[s]ince Congress was well aware that there were state antitrust laws in effect and chose not to preempt them, we believe that neither did it intend to preempt anything in them." *Pinney Dock & Transport Co.* v. *Penn Central Corp.*, 838 F.2d 1445, 1482 (6th Cir. 1988), cert. denied, No. 88-72 (Oct. 3, 1988). Although the court's absolutist statement may sweep too broadly, it properly indicates that the presumption against preemption of state remedial legislation in the antitrust field is well established.

B. State Statutes Affording Indirect Purchasers A Damage Remedy Do Not Create An Irreconcilable Conflict With Federal Law

Despite the clear authority of the States to enact and provide for the enforcement of antitrust laws, the court of appeals held that state indirect-purchaser remedies are preempted because they conflict with federal law. In our view, however, there is no "irreconcilable conflict" (*Rice* v. *Norman Williams Co.*, 458 U.S. 654, 659 (1982)). It is not a "physical impossibility" to comply with both federal and state laws. *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. at 142-143; see *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 257 (1984) (it is not physically impossible to pay federal fines and state-imposed punitive damages for the same incident). The state statutes do not authorize or mandate conduct that violates the antitrust laws or any other federal laws. See *Rice* v. *Norman Williams Co.*, 458 U.S. at 661; see also *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384 (1951). Indeed, what is at issue in this case is not the scope of liability but remedies.[9]

[9] Even when the scope of liability is at issue, the line of "state action cases" beginning with *Parker* v. *Brown,* 317 U.S. 341 (1943), holds that the Sherman Act does not deprive States of their power to enact statutes that displace competition altogether, even though the core policy of the Sherman Act is to promote competition. See, *e.g.*, *Hoover* v. *Ronwin,* 466 U.S. 558, 567-568 (1984) ("under the Court's rationale in *Parker,* when a state legislature adopts legislation, its actions constitute those of the State * * * and *ipso facto* are exempt from the operation of the [federal] antitrust laws"). Given this latitude to depart from even the core procompetitive policy of the Sherman Act, it is anomalous to suggest that the States must invariably conform to particular policies that this Court has invoked in determining appropriate federal remedies for antitrust violations.

The fact that the substantive prohibitions of the state and federal laws are in harmony makes it "particularly inappropriate" to infer preemption (*Exxon Co. p.* v. *Governor of Maryland,* 437 U.S. at 132). Like the state laws at issue, the Sherman Act prohibits the price fixing alleged in this case. The purposes of the state and federal private damage remedies correspond as well: Congress and the States both seek to compensate victims of antitrust violations and use antitrust civil recoveries to deter future violations of the antitrust laws. *Union Carbide Corp.* v. *Superior Court,* 36 Cal. 3d 15, 20-22, 679 P.2d 14, 17-18, 201 Cal. Rptr. 580, 583-584 (1984); *Illinois Brick,* 431 U.S. at 746.

The court of appeals, relying on the opinions in *Illinois Brick* and *Hanover Shoe,* nevertheless held (J.S. App. A19, A25) that state indirect-purchaser statutes "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." See *Hines* v. *Davidowitz,* 312 U.S. 52, 67 (1941) (footnote omitted); *CTS Corp.* v. *Dynamics Corp. of America,* No. 86-71 (Apr. 21, 1987), slip op. 8. Neither *Illinois Brick* nor *Hanover Shoe,* however, contains any reference to state law or a congressional intent to preempt. Indeed, although the Court in those cases was engaged in a task of statutory interpretation, its decisions rested on a weighing of competing policy concerns rather than an analysis of statutory text and legislative history.

Despite the limited nature of the inquiry undertaken by the Court in *Illinois Brick* and *Hanover Shoe,* the court of appeals discerned in those decisions three federal policies that it believed state indirect-purchaser statutes would obstruct: "(1) avoiding unnecessarily complicated litigation; (2) providing incentives to direct purchasers to bring private damages actions; and (3) avoiding multiple liability for defendants" (J.S. App. A20-A21). The policies to

which the court of appeals referred are important and relevant to the proper construction of a federal statute, especially in the absence of specific evidence as to Congress's intent in enacting the provision.[10] This Court's conclusion that those policies would be served by its construction of the federal statute, however, does not establish a congressional intent to preempt state statutes reflecting differing policy judgments.

The court of appeals' analysis would dramatically expand *Davidowitz,* requiring the States not only to avoid interference with Congress's affirmative purposes but also to refrain from adopting any remedy that Congress declines to adopt for federal purposes. But in the absence of any evidence that Congress intended to make federal remedies exclusive, *Davidowitz* does not require the States to adhere to Congress's judgments as to the most efficacious remedies. Viewed from this perspective, the three policy considerations identified by the court of appeals give rise to no conflict between federal and state law.

1. In *Hanover Shoe,* the Court held that a defendant in an antitrust case may not invoke a "pass-on" defense—that is, a defense that alleges that the overcharge claimed by the plaintiff was passed on by the plaintiff to others in the distribution chain and that the overcharge therefore did not injure the plaintiff (see 392 U.S. at 487-488, 491-492). Concluding that the pass-on defense "would require a convincing showing of * * * virtually unascertainable figures" and that "the task would normally prove insurmountable" (*id.* at 493), the Court was unwilling to require federal courts enforcing a federal statute to embark on such "long and complicated proceedings involving massive evidence and complicated theories" (*ibid.*)

[10] The court of appeals, however, misunderstood one of the policies animating this Court's decisions in *Hanover Shoe* and *Illinois Brick*. See p. 19, *infra*.

Subsequently, in *Illinois Brick*; indirect purchasers sought to use the pass-on theory offensively. The Court decided that determined that the rationale of *Hanover Shoe*—"that the attempt to trace complex economic adjustments to a change in the cost of a particular factor of production would greatly complicate * * * already protracted treble-damage proceedings"—applies equally to assertion of pass-on theories by plaintiffs (431 U.S. at 732). It found the "costs to the judicial system and the efficient enforcement of the antitrust laws" (*ibid.*) that would result from allowing plaintiffs to use pass-on theories to be unacceptably high. See also *id.* at 741-745.

The court of appeals viewed these decisions as precluding recovery under state indirect-purchaser statutes that would also "complicate antitrust enforcement" (J.S. App. A21). It observed, no doubt correctly, that since plaintiffs will often bring federal and state antitrust claims together in federal court, "complications are unavoidable" (*id.* at A22). But the Court's decisions in *Illinois Brick* and *Hanover Shoe* were intended to promote efficient administration of *federal* antitrust claims, by limiting the issues that would be litigated under the federal statutes. They did not address the wisdom of state legislatures in submitting state antitrust recovery to "long and complicated proceedings" (392 U.S. at 493). There is no Clayton Act policy to limit the complexity of antitrust proceedings under state law.

To the extent that the Court in *Illinois Brick* and *Hanover Shoe* discerned a congressional policy to limit the demands placed on the federal judiciary by a federal statute, such a policy is not relevant here.[11] As the court of

[11] Congress itself on occasion has been willing to cope with the complexities of calculating passed-on costs, and this Court has upheld the constitutionality of requiring claimants of a tax refund to prove that they did not pass on increased costs. See *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337, 347-356 (1937).

appeals acknowledged (J.S. App. A21-A22), indirect-purchaser claims will not complicate federal damage claims if brought in a state court. To be sure, the state indirect-purchaser claims at issue in this case were before the district court as pendent state claims (J.S. App. A64, A87, A104, A122). But whether the federal court should accept jurisdiction of those claims is governed by the body of law dealing with pendent jurisdiction, not by the policies of the Clayton Act. It is well established that a federal court may decline to exercise pendent jurisdiction if the state claims impose significant additional burdens. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725-726 (1966); see also 13B C.A. Wright, *Federal Practice and Procedure* § 3567.1, at 122-132 (1984). It is one thing to say that, because rights created by state law require complicated proceedings for their enforcement, the federal courts will not enforce those rights themselves in an exercise of pendent jurisdiction but will instead leave the matter to state courts. It is quite a different thing to say, as the Ninth Circuit did here, that the complicated proceedings required to vindicate state-created rights are a justification for holding that the State has no power to create those rights at all.

Moreover, even if one accepts the court of appeals' gloomy view that federal courts will inevitably be drawn into complex proceedings that require them to sort out direct and indirect purchasers' claims under federal and state law, the court of appeals was still wrong to treat that as a justification for holding that the State has no power to create indirect-purchaser recovery rights. The reason why avoiding complicated proceedings was an important consideration in *Hanover Shoe* and *Illinois Brick* is that Congress itself had provided no clear guidance on the indirect-purchaser question. Therefore, concerns of public policy that would be relatively insignificant if Congress's

intent were readily ascertainable took on greater weight. As this Court subsequently described its *Hanover Shoe* and *Illinois Brick* holdings (*Blue Shield* v. *McCready*, 457 U.S. 465, 475 n.11 (1982) (emphasis added), quoting *Hanover Shoe*, 392 U.S. at 493)),

> [T]he feasibility and consequences of implementing particular damages theories may, *in certain limited circumstances,* be considered in determining who is entitled to prosecute *an action brought under § 4.* Where consistent with the broader remedial purposes of the antitrust laws, we have sought to avoid *burdening § 4 actions* with damages issues giving rise to the need for "massive evidence and complicated theories," where the consequence would be to discourage vigorous enforcement of the antitrust laws by private suits.

But the limited role that this Court has allowed this consideration to play in determining the reach of the federal statute hardly supports the notion of the court of appeals that the States are forbidden from making a different policy choice about the desirability of complicated proceedings than the one that has been made at the federal level. Only by forgetting this Court's many reminders about the reluctance with which preemption is to be inferred (see pp. 8-9, *supra*) could a court find preemption on such a slender basis as this.

2. The Court in *Illinois Brick* and *Hanover Shoe* also noted that allowing pass-on theories in federal suits could reduce the deterrent effect of private suits, by decreasing the incentive of direct purchasers—the class most likely to act as "private attorneys general"—to sue. The Court reasoned that, if effective measures for allocating overcharges in the chain of distribution could be fashioned, direct purchasers' recoveries would be diminished by the recoveries of indirect purchasers. But, since the indirect

purchasers would have only a "tiny stake" and little incentive to sue, the overall deterrent effect of federal civil damage suits would be reduced. *Hanover Shoe*, 392 U.S. at 494; see also *Illinois Brick*, 431 U.S. at 725-726, 734-735, 745-746.

This Court's decisions, however, do not elevate maximizing the direct purchasers' incentives to sue into an end in itself. Rather, those decisions make clear that the direct purchasers' incentive to sue is merely a means to an end—enhancing the deterrent effect of the antitrust laws. The court of appeals therefore erred in interpreting *Illinois Brick* and *Hanover Shoe* to favor a policy of maximizing incentives for direct purchasers per se (see J.S. App. A20-A21).[12] As between the two possibilities that the Court seriously considered in *Hanover Shoe* and *Illinois Brick*—allowing direct purchasers and only direct purchasers to sue for the entire amount of an overcharge, versus allowing both direct purchasers and any indirect purchasers to sue, and requiring apportionment of the overcharge among them—we have little doubt that the Court correctly discerned that the former alternative would provide the greater deterrent effect, for the reasons the Court gave in its opinions. But those are not the alternatives here.

The right of direct purchasers to a full recovery without any pass-on defense is guaranteed by federal law as construed in *Hanover Shoe* and thus under the Supremacy

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[12] The very same passages from those opinions that the court of appeals relied on have been cited by this Court for a quite different proposition (*Blue Shield* v. *McCready*, 457 U.S. 465, 473 n.10 (1982)): "Only by requiring violators to disgorge the 'fruits of their illegality' can the deterrent objectives of the antitrust laws be fully served. *Hanover Shoe Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968). See * * * *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 746 (1977)."

Clause cannot be taken away by any state statute.[13] Accordingly, the state statutes cannot themselves be applied to require apportionment between direct and indirect purchasers of any federal damages recovered.[14] The only question here is whether federal law makes direct purchasers the *only* proper antitrust plaintiffs, even in the face of state statutes giving indirect purchasers the right to sue, or whether the indirect purchasers' state-law rights will be recognized in addition to the direct purchasers' federal-law rights. As between *those* alternatives, it cannot be maintained that the latter, which simply creates additional liability for the same conduct and thus adds additional disincentives to those that already exist under federal law, meaningfully undermines the goal of deterrence.

[13] No one has suggested that the state statutes at issue in this case would be construed to allow a passing-on defense against a direct purchaser, in an action in which the direct purchaser asserts its federal-law right to recover treble damages. Nor would the state statutes take away from the direct purchaser and give to the indirect purchaser a portion of the damages recovered under the federal statute that is attributable to passed-on overcharges. If any state statute is so construed, it would be preempted as so applied, as being in direct conflict with the direct purchaser's federal recovery rights set forth in *Hanover Shoe*. See Note, *Indirect Purchaser Suits Under State Antitrust Laws: A Detour Around the* Illinois Brick *Wall*, 34 Stan. L. Rev. 203, 208 n.24 (1981); *Hines* v. *Davidowitz*, 312 U.S. at 67. In this regard, we agree with the court of appeals (J.S. App. A21), but we believe the court was not at that point addressing the genuine issues that would in fact be raised by application of the state statutes.

[14] In this case, of course, there presumably will be some reduction of the direct purchasers' recovery from the settlement fund if the indirect purchasers are also allowed to share in the settlement fund. That result occurs, however, not because the *state statutes* take anything away from the direct purchasers but because the direct purchasers elected to participate in a settlement in which the defendants' total liability is fixed and to leave for later resolution the question whether they must share that fund with the indirect purchasers.

To be sure, there may be rare situations in which permitting additional plaintiffs to sue for damages in addition to those already available would marginally reduce rather than increase overall deterrence. The court of appeals focused (J.S. App. A22) on one situation in which that might be true: where the defendant has insufficient assets to pay all the claims of the direct and indirect purchasers. In that scenario, each direct purchaser might recover less than the full amount of its claim, and therefore the incentive of each direct purchaser to sue would be less than it would be if only direct purchasers could sue. Conceivably, the decreased litigation incentive of the direct purchasers in this situation could be large enough to offset the increased litigation incentive of the indirect purchasers, thus reducing the overall deterrent effect of the antitrust laws.

Such a hypothetical situation, however, provides no basis for holding that state indirect-purchaser laws so frustrate federal objectives that they are preempted. The fact that a state law might marginally reduce the deterrence of antitrust violations in rare cases is no basis for holding that the same law, which in other cases could increase the deterrence of antitrust violations, is on the whole so contrary to federal policy as to justify its preemption in all cases. The general thrust of state laws permitting indirect-purchaser suits is consistent with the federal policy of deterring antitrust violations, and that policy therefore provides no basis for holding such laws to be preempted.

In observing that state indirect-purchaser statutes are not antithetical to federal antitrust law, we do not mean to suggest that we agree with the States' decision that such statutes make for good antitrust policy. We do not regard as insufficient the deterrence provided by the federal rule, as articulated in *Hanover Shoe* and *Illinois Brick*. Nor

would we advocate as a matter of antitrust policy a regime in which both direct and indirect purchasers are entitled to recover for the same overcharge with all the added complexities that entails. The question here, however, is not whether the state statutes are wise but whether they stand as an obstacle to accomplishment of the purposes of Congress.

3. The court of appeals found the "most direct[]" conflict with federal policy in "the risk of multiple liability for defendants" if state indirect-purchaser statutes are not preempted (J.S. App. A22-A23).[15] But there is no federal policy against antitrust violators having to pay amounts cumulating to more than three times the overcharge.[16] This Court determined only that Congress did not intend an antitrust defendant to be held liable for more than one set of treble damages under Section 4 of the Clayton Act. See Note, *supra*, 34 Stan. L. Rev. at 212. There was no suggestion in *Illinois Brick* or *Hanover Shoe* that this rule governs liabilities imposed by separate sovereigns.[17]

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[15] The court of appeals did not explain how closely the state statute would have to resemble the federal antitrust laws for liability to be considered duplicative. Not only "little" Sherman Acts, but other state laws providing damages for anticompetitive actions, could be considered to duplicate Clayton Act damages.

[16] Essentially for the reasons given by the court of appeals (J.S. App. A24), we assume for the purpose of analysis that some or all of the indirect-purchaser claims in this case are duplicative of direct-purchaser claims. See U.S. Amicus Br. in support of appellants' Jurisdictional Statement 15 & n.18. Unlike the court of appeals, however, we believe that the state statutes survive federal scrutiny even on that assumption.

[17] Indeed, there is not even a rule protecting defendants against additional liability under other federal provisions. For example, under federal law alone a defendant may be required to pay criminal fines in addition to treble damages. See, *e.g.*, *New York* v. *Hendrickson Bros.*, 840 F.2d 1065, 1086 (2d Cir. 1988); see also Clayton Act § 5, 15 U.S.C. 16(a) (criminal conviction can be used as prima facie evidence

It was well established before the Sherman Act was enacted in 1890 that state and federal sovereigns could simultaneously command obedience to prohibitions relating to the same act, and that each could impose sanctions for disobedience. "Where a person owes a duty to two sovereigns, he is amenable to both for its performance; and either may call him to account." *Ex parte Siebold*, 100 U.S. 371, 387-389 (1879). "The people of the United States resident within any State are subject to two governments: one State, and the other National; but there need be no conflict between the two. * * * The citizen * * * owes allegiance to the two departments, so to speak, and within their respective spheres must pay the penalties which each exacts for disobedience to its laws. In return, he can demand protection from each within its own jurisdiction." *United States* v. *Cruikshank*, 92 U.S. 542, 550-551 (1875).

One consistent application of that principle has been this Court's repeated holdings that it is not a violation of the Double Jeopardy Clause for a State and the federal government both to prosecute and punish a defendant for a single crime. See *United States* v. *Lanza*, 260 U.S. 377, 382 (1922) (the States and the federal government are "two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory," and "an act denounced by * * * both national and state governments is an offense against the peace and dignity of both and may be punished by each"); *Abbate* v. *United States*, 359 U.S. 187 (1959); *United States* v. *Wheeler*, 435 U.S. 313, 316-317, 320 (1978);

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of antitrust violation in subsequent civil suit); 18 U.S.C. (Supp. IV) 3623(c)(1) (repealed effective Nov. 1, 1987) (authorizing criminal penalties amounting to twice the defendant's pecuniary gain or twice the victim's pecuniary loss).

Heath v. *Alabama*, 474 U.S. 82, 88-89, 92-93 (1985). This Court's preemption cases also support the principle that the States are not limited to the remedies established by Congress but may provide additional or different remedies for the same conduct. See, *e.g.*, *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. at 256 (state tort remedies are available for nuclear incidents despite exclusive federal regulation of nuclear safety, because Congress was aware of state remedies and tolerated tension between state and federal schemes); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. at 141-142 (more stringent state standards for locally shipped produce are acceptable); *Exxon Corp* v. *Governor of Maryland*, 437 U.S. at 131 (state law bans what federal law permits, but is not preempted); see also *California* v. *Zook*, 336 U.S. at 729-732.

The States and the federal government have established rules that, in some circumstances, afford different parties causes of action against the same antitrust violator for the same conduct. Our own view is that the federal rule is superior, for all the reasons articulated in this Court's *Illinois Brick* and *Hanover Shoe* decisions. But some States, including California, Minnesota, and Alabama have placed an emphasis on compensating all injured parties—even at the risk, apparently, of requiring antitrust violators to pay out more than three times the overcharge.[18] Congress has indicated no affirmative in-

[18] It is possible that the States' indirect-purchaser statutes might be construed, as a matter of state statutory interpretation rather than federal preemption, to deny indirect purchasers any recovery that would duplicate a direct purchaser's recovery. The court of appeals, however, did not address any such question of state statutory construction (J.S. App. A24), nor do we. This case does not involve any issue about allowing a *single* plaintiff to recover damages twice for the same overcharge, under both federal and state law. Such recovery would generally be barred by recognized principles concerning merger and splitting causes of action. See Restatement (Second) of Judgments §§ 18, 24-25 (1982). See also U.S. Amicus Br. in support of appellants' Jurisdictional Statement 16 n.20 (collecting cases).

tention to preclude the establishment of such additional causes of action under state law. To the contrary, as we have noted (see pp. 9-12, *supra*), the legislative history of the federal antitrust laws demonstrates Congress's specific intention not to interfere with state antitrust enforcement. Accordingly, the usual presumption that the federal government welcomes coordinate state enforcement "to combat [a particular] evil" (*California* v. *Zook*, 336 U.S. at 737; *Union Brokerage Co.* v. *Jensen*, 322 U.S. 202, 209 (1944)) applies with particular force here.

As this Court observed in *Parker* v. *Brown*, 317 U.S. 341, 351 (1943), "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a State's control over its officers and agents is not lightly to be attributed to Congress." Such an "unexpressed purpose" cannot be inferred here, and accordingly, state statutes allowing recovery by indirect purchasers for overcharges resulting from anticompetitive activities are not preempted by the Clayton Act. See *Crown Oil Corp.* v. *Superior Court*, 177 Cal. App. 3d 604, 223 Cal. Rptr. 164, appeal dismissed, 479 U.S. 879 (1986); Note, *supra*, 34 Stan. L. Rev. at 212; Note, *State Indirect Purchaser Statutes: The Preemptive Power of* Illinois Brick, 62 B.U.L. Rev. 1241 (1982).

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

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AMICUS CURIAE

BRIEF

(5)

No. 87-1862

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF CALIFORNIA, ET AL.,
Appellants,

v.

ARC AMERICA CORPORATION, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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BRIEF OF THIRTY-FIVE STATES AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF APPELLANTS

INTRODUCTION

The States of Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri,

Montana, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, Wyoming, and the District of Columbia ("Amici States") submit this brief in support of the Brief submitted by the Appellants, the States of California, Minnesota, Arizona, and Alabama.

INTERESTS OF THE AMICI STATES

The Amici States have a clear and strong interest in defending the constitutionality of statutes enacted by their legislatures. The Attorneys General of the Amici States are charged with the responsibility to defend the constitutionality of their States' statutes. See, e.g., Md. Cts. & Jud. Proc. Code Ann. § 3-405 (1984); Va. Code § 2.1-121 (1987, 1988 Supp.) See also, 28 U.S.C. § 2403(b).

In the instant case, the Ninth Circuit Court of Appeals considered four State statutes providing indirect purchasers with a right to recover monetary damages from antitrust wrongdoers. The court held

that these statutes were preempted because they conflict with the interpretation given federal antitrust statutes. In Re Cement and Concrete Antitrust Litigation, 817 F.2d 1435, 1447 (9th Cir. 1987) ("Cement"). A number of the Amici States have enacted statutes permitting indirect purchasers to sue for monetary damages under their antitrust statutes. See D.C. Code § 28-4509 (1981); Haw. Rev. Stat. § 480-13 (Supp. 1987); Ill. Rev. Stat. Ch. 38 § 60-7(2) (Supp. 1987); Kan. Stat. Ann. § 50-801(b) (1987 Supp.); Md. Com. Law Code Ann. § 11-209(b)(2)(ii) (1983); Mich. Comp. Laws § 445.778 (1984); Miss. Code Ann. §§ 75-21-9, 75-41-15 (1972); S.D. Codified Laws Ann. § 37-1-33 (1986); Wisc. Stat. Ann. § 133.18(1) (West Supp. 1987). Although these statutes are not directly at issue in this case, inevitably the decision of this Court will be asserted to sustain or to challenge their constitutionality.

State antitrust laws are generally construed to be consistent with the federal antitrust laws. Many State

antitrust laws, however, include provisions which differ from federal antitrust law. See Lifland, State Antitrust Law § 1.02 at 1-3--1-10 (1988). For example, some State statutes of limitations applying to antitrust cases differ from the statute of limitations in the Clayton Act.[1/] Other State antitrust statutes provide remedies, like civil penalties, that differ from or add to the remedies available under federal law. See, e.g., Conn. Gen. Stat. § 35-38 (1987); N.J. Rev. Stat. § 56:9-10(c) (Supp. 1987); Va. Code § 59.1-9.11 (1987). See also Colo. Rev. Stat. §6-4-106 (Supp. 1988) (recoupment for payments made).

1/ Compare 15 U.S.C. § 15b (four year statute of limitations) and Ohio Rev. Code Ann. § 1331.12 (1979) ("No statute of limitation shall prevent or be a bar to any suit or proceeding for any violation" of the Valentine Act, Ohio's antitrust law.) A federal district court held that Ohio's statute of limitations was preempted by the Clayton Act. Pinney Dock & Transport Co. v. Penn Central Corp., 660 F. Supp. 859 (N.D. Ohio 1982). The Sixth Circuit recently reversed and held that this statute was not preempted. Pinney Dock & Transport Co. v. Penn Central Corp., 838 F.2d. 1445, 1482 (6th Cir. 1988).

Affirmance of the decision below might conceivably provide a basis for challenging any State law provision that differs from this Court's construction of comparable federal law in the same subject area. The Attorneys General of the respective States would be required to defend their statutes from such challenges. The prospect of such challenges creates unnecessary uncertainty and would hamper the effective enforcement of State laws.

Finally, the Amici States and their consumers are major purchasers of goods and products that pass through chains of distribution. They bear the burden of unlawful overcharges passed on to them. Thus, the States, in their proprietary capacity and as parens patriae on behalf of their consumers, see, e.g., W. Va. Code § 47-18-17; D.C. Code Ann. § 28-4507(b)-(e), have a strong interest in preserving antitrust damage remedies for overcharges on indirect as well as direct purchases.

The Amici States support the contention of California, Arizona, Minnesota, and Alabama that State statutes permitting recovery of damages by indirect purchasers under State antitrust laws do not conflict with federal antitrust law or policy. Such statutory provisions do not offend the Constitution and are not preempted.

SUMMARY OF ARGUMENT

Congress has never expressly preempted State statutes allowing indirect purchasers to recover monetary damages from antitrust wrongdoers. Recognizing this, the court below relied on the doctrine of implied preemption to hold that State indirect purchaser statutes are preempted by federal law.

The key question in determining whether a State statute is impliedly preempted is: does the State statute stand as an obstacle to accomplishing the purposes and objectives of Congress? State indirect purchaser statutes do not obstruct the Congressional

purpose embodied in section 4 of the Clayton Act. 15 U.S.C. § 15. The purpose of Congress underlying section 4 is to provide a "broad" and "expansive" remedy to persons injured by antitrust violations.

State indirect purchaser statutes are consistent with and complement this Congressional purpose. While this Court's decision in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), may be consistent with Congressional purpose, the concerns identified in that case do not constitute the purpose of Congress.

The court below erred by holding that the State indirect purchaser statutes were impliedly preempted. The lower court's decision was not based upon a consideration of Congressional purpose, but on narrower concerns expressed by this Court in Illinois Brick and Hanover Shoe, Inc. v. United Shoe Machinery Co., 392 U.S. 481 (1968).

The decision of the Court below would, if upheld, constitute an abridgment of the exercise of a traditional State police power embodied in State

antitrust law. This Court has held that State police powers will not be preempted absent a finding of a "clear and manifest purpose of Congress" to preempt them. Congress has expressed no such "clear and manifest" purpose with regard to State indirect purchaser statutes. To the contrary, there is strong evidence that Congress did not intend to preempt State indirect purchaser statutes.

For example, to become effective, legislative acts of the District of Columbia City Council must first be submitted to both houses of Congress for a 30-day review period. During this review period, Congress may veto these measures before they become law. The District's Antitrust Act, which includes an indirect purchaser provision, was submitted to Congress for review in 1980. Congress permitted the Act to become law and has not since acted to overturn its indirect purchaser provision.

In addition, both Congress and this Court have recognized that regulation of competition is a matter

of dual sovereignty between the States and the federal government. This Court has recognized this dual sovereignty in the state action doctrine it articulated in Parker v. Brown, 317 U.S. 341 (1943). Moreover, when Congress seeks to preempt State antitrust remedies, it does so with express language. Clearly, Congress does not intend to preempt State antitrust remedy legislation by implication.

The concept of dual sovereignty was central to the federal antitrust laws even at their inception. Senator Sherman, urging passage of the Sherman Act, stated that the federal legislation was intended to "supplement" State enforcement efforts. 21 Cong. Rec. 2457 (1890). Moreover, Senator Sherman stated that the intent of the federal legislation was to permit federal courts "to cooperate with the State courts in checking, curbing, and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States." Id. (emphasis added).

State indirect purchaser statutes should and indeed do coexist with federal antitrust remedies. Both accomplish the broad, remedial purpose of providing full and complete relief to the victims of antitrust wrongdoers.

ARGUMENT

I.

STATE INDIRECT PURCHASER STATUTES ARE CONSISTENT WITH THE PURPOSES AND OBJECTIVES OF CONGRESS AND ARE THEREFORE NOT PREEMPTED BY FEDERAL ANTITRUST LAW.

A.

FEDERAL ANTITRUST LAW DOES NOT EXPRESSLY PREEMPT STATE INDIRECT PURCHASER STATUTES.

Congress has not expressly preempted State indirect purchaser statutes under any of the three tests recognized by this Court. Congress has neither stated an intent to occupy the field of antitrust enforcement; nor has Congress set forth a scheme of regulation so comprehensive that it is reasonable to conclude that Congress has left no room for State

antitrust regulation; nor are State indirect purchaser laws in actual conflict with federal law. See California Federal Savings and Loan Ass'n. v. Guerra, 107 S.Ct. 683, 689 (1987); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984). Indeed, the Court below recognized this point stating, "No one argues that Congress intended federal law to occupy entirely the field of antitrust law." Cement, 817 F.2d at 1444.

B.

THE COURT BELOW ERRED IN HOLDING STATE INDIRECT PURCHASER STATUTES IMPLIEDLY PREEMPTED WITHOUT REFERRING TO THE PURPOSES AND OBJECTIVES OF CONGRESS.

1.

The Lower Court Erroneously Applied the Implied Preemption Doctrine to State Indirect Purchaser Statutes.

Unable to find an express intention by Congress to supersede State indirect purchaser statutes, the

court below relied upon the doctrine of implied preemption.[2/] Implied preemption only occurs:

> when it is impossible to comply with both State and federal law, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217-1218, 10 L.Ed.2d 248 (1963); or where the State law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). Pacific Gas & Electric, supra, at 203-04, 103 S.Ct. at 1721-22.

Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984).[3/] The "teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between State and federal regulation where none clearly exists." Exxon Corp. v. Governor of Md., 437 U.S. 117, 130 (1978). See also Rice v. Norman Williams Co., 458 U.S. 654, 664 (1982).[4/]

Indeed, this caution is particularly relevant in the instant case where a State police power is involved. This Court has made clear that, where Congress legislates in a field in which the States have traditionally exercised police power, "we start with

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2/ The Ninth Circuit's ruling that State indirect purchaser statutes are preempted by federal law conflicts with decisions of the Fifth Circuit Court of Appeals and California's appellate courts. See In Re Chicken Antitrust Litigation, 669 F.2d 228 (5th Cir. 1982); Crown Oil Co. v. Superior Court, 177 Cal. App. 604, rev. denied 177 Cal. App. 3d 614 (Cal. Sup. Ct. 1986), appeal dismissed for want of jurisdiction sub. nom. Crown Oil Corp. v. Lapidus Popcorn, Inc., 107 S.Ct. 265 (1986).

In Chicken, the Fifth Circuit held that indirect purchasers "could resort to state law remedies" to recover damages from antitrust wrongdoers. The court made express reference to the indirect purchaser provisions of the antitrust laws of appellants Alabama and California. 669 F.2d at 238, 239, n.18.

The Crown Oil court permitted California indirect purchasers to sue under the indirect purchaser provisions of California's antitrust statutes. The court determined that California's statute was not preempted after concluding that the "fact that the injured indirect purchasers may recover under state law does not obstruct the federal scheme which allows recovery only by direct purchasers." 177 Cal. App. 3d. at 612.

3/ The court below did not find it impossible for the defendants to comply with both federal and State antitrust statutes. See Silkwood, 464 U.S. at 257 ("Paying both federal fines and state-imposed punitive damages for the same incident would not appear to be physically impossible").

4/ The Amici States understand that Appellants' brief on the merits provides a comprehensive analysis of the law of preemption. For the sake of brevity, this analysis will not be restated here.

the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." P.R. Dept. of Consumer Affairs v. Isla Petroleum, 108 S.Ct. 1350, 1353 (1988) (emphasis added, citation omitted).[5/]

The court below committed a fundamental error when it confused the considerations utilized by this Court in construing section 4 of the Clayton Act with the overriding purposes and objectives of Congress.[6/] It ignored the clear rule that the "purposes and objectives of Congress" are the critical focus of

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5/ The lower court's reliance upon implied preemption is misplaced because Congress has not expressed a "clear and manifest" intent to preempt State indirect purchaser statutes. See discussion at pp. 30-34, infra.

6/ Section 4 of the Clayton Act provides, in pertinent part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained . . . . 15 U.S.C. § 15.

preemption analysis. Silkwood, 464 U.S. at 248. See Retail Clerks, Int'l. Ass'n. v. Schermerhorn, 375 U.S. 96, 103-4 (1963).[7/]

Instead, the lower court held that State indirect purchaser statutes were impliedly preempted because "the indirect purchase claims asserted here would impermissibly interfere with the three policy goals outlined [by this Court] for federal antitrust law claims in Hanover Shoe and Illinois Brick." Cement, 817 F.2d at 1445.[8/] It described these "policy goals"

7/ The purposes and objectives of Congress in enacting section 4 of the Clayton Act were to provide a broad and expansive remedy for antitrust violations. See Blue Shield of Virginia v. McCready, 457 U.S. 465, 472-75 (1982) and discussion at pp. 20-25, infra.

8/ The court below made no effort to limit its decision to the effects of State indirect purchaser statutes on interstate trade. Yet, courts have recognized in recent cases that some conspiracies are entirely intrastate in character and beyond the reach of federal antitrust law. See, e.g., Mitchell v. Frank R. Howard Memorial Hospital, 853 F.2d 762, 764-5 (9th Cir. 1988); Seglin v. Esau, 769 F.2d 1274, 1283 (7th Cir. 1985). Clearly, the decision of the court below cannot limit indirect purchaser statutes insofar as they apply to purely intrastate conspiracies.

as: "(1) avoiding unnecessarily complicated litigation; (2) providing incentives to direct purchasers to bring private damage actions; and (3) avoiding multiple liability for defendants." Cement, 817 F.2d at 1445.[9/]

As demonstrated below, in Hanover Shoe, Inc. v. United Shoe Machinery Co., 392 U.S. 481 (1968), and Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), this Court did not intend to limit State antitrust laws. Moreover, the policy goals expressed in Hanover Shoe and Illinois Brick are not, and were not intended to constitute, the "purposes and objectives of Congress."

2.

This Court's Holdings in Hanover Shoe and Illinois Brick Were Limited to Construction of Section 4 of the Clayton Act.

In Illinois Brick, this Court construed section 4 of the Clayton Act to determine that, for purposes of

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9/ These judicial policy considerations govern the construction of federal antitrust law. However, they do not constitute the purpose of Congress and, as a result, do not supplant countervailing concerns addressed by State antitrust laws. See discussion at pp. 20-25, infra.

recovering monetary damages under federal antitrust law, direct purchasers were the appropriate plaintiffs in most cases. This decision was a logical extension of this Court's reasoning in Hanover Shoe, where the Court held that a direct purchaser is injured by the full amount of any overcharge paid by it. A defendant cannot raise as a defense to a federal antitrust claim the fact that the direct purchaser had passed on the overcharges to indirect purchasers. See Hanover Shoe, 392 U.S. at 487-94 (1968).

In Illinois Brick, this Court reaffirmed and extended its holding in Hanover Shoe, ruling that, in most situations, an indirect purchaser is not injured in its business or property within the meaning of section 4 of the Clayton Act.[10/] See Illinois Brick, 431 U.S. at 733-37 (1977). In effect, the Illinois Brick decision recognizes a defense against treble damage claims

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10/ See fn. 6, supra.

brought by indirect purchasers under federal antitrust law.[11/]

The holdings of Hanover Shoe and Illinois Brick were confined to a construction of section 4 of the Clayton Act and were not intended to constitute statements of the purposes and objectives of Congress in enacting section 4.[12/] In Illinois Brick, this Court stated the issue presented:

> In this case we once again confront the question whether the overcharged direct purchaser should be deemed for purposes of § 4 to have suffered the full injury from the overcharge . . .

431 U.S. at 724 (emphasis added). This Court gave no indication in Illinois Brick or Hanover Shoe that it intended or expected that its decision would affect State antitrust laws. Indeed, State laws and remedies were not even discussed.

11/ See discussion at pp. 40-42, infra.

12/ Congress' purpose in enacting section 4, like the States' purposes in enacting indirect purchaser statutes, was to provide a broad and expansive remedy to victims of antitrust violations. See discussion at pp. 21-22, infra.

If this Court had found that indirect purchasers could not recover damages as a matter of fundamental Congressional policy, it would have been obliged to bar recovery by such purchasers in all cases. This Court, however, made exceptions to the general rule barring such claims. For example, the Court recognized exceptions to the indirect purchaser defense when the indirect purchaser obtained goods pursuant to a pre-existing cost-plus contract, Illinois Brick, 431 U.S. at 735-36, or from a direct purchaser owned or controlled by the defendant. 431 U.S. at 736 n.16.[13/]

13/ Federal courts have subsequently extended Illinois Brick exceptions to cost-plus rate regulation, Illinois v. Panhandle Eastern Pipe Line Co., 852 F.2d 891, 899 (7th Cir. 1988) petition for cert. filed, 57 U.S.L.W. 2057 (U.S. October 17, 1988) (No. 88-658), sales that are the "functional equivalent" of a cost-plus contract, see In Re Beef Industry Antitrust Litigation, 600 F.2d 1148 (5th Cir. 1979), cert. denied 449 U.S. 905 (1980), and sales where the direct purchaser is a co-conspirator of the manufacturer, see In Re Petroleum Products Antitrust Litigation, 691 F.2d. 1335 (9th Cir. 1982); In re Mid-Atlantic Toyota Antitrust Litigation, 516 F. Supp. 1287 (D.Md. 1981).

3.

The Three Policy Goals Underlying Hanover Shoe and Illinois Brick Do Not Constitute the Purposes and Objectives of Congress in Enacting Section 4 of the Clayton Act.

The lower court's ruling relied upon the three concerns of this Court in Illinois Brick, and not upon the purposes and objectives of Congress, in construing section 4 of the Clayton Act. By failing to distinguish between judicial concerns and Congressional purpose, the court below violated the fundamental rule of preemption analysis, that "[t]he purpose of Congress is the ultimate touchstone." Retail Clerks Int'l. Ass'n. v. Schermerhorn, 375 U.S. at 103. In fact, as will be demonstrated below, the purpose of Congress in enacting section 4 was to provide a broad and expansive remedy. This purpose is entirely consistent with State indirect purchaser statutes.

In Blue Shield of Virginia v. McCready, 457 U.S. 465, 472-75 (1982), this Court articulated both the "expansive remedial purpose" of Congress embodied in

section 4 of the Clayton Act and the narrower considerations employed by the Court to decide Illinois Brick. In McCready, the Court granted the plaintiff standing to sue an insurer that had allegedly conspired with physicians to exclude psychologists from receiving payments from the insurer under the plaintiff's insurance plan. The Court identified the "expansive remedial purpose" of Congress in enacting section 4 of the Clayton Act and stated, "The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." 457 U.S. at 472. The Court added, "Consistent with the congressional purpose, we have refused to engraft artificial limitations on the § 4 remedy." Id.

Although the Court stated that the concerns against duplicative recovery expressed in Illinois Brick were identified by "drawing on statutory policy," 457 U.S. at 473, McCready recognized that the purpose of Congress was to provide an expansive remedy in

section 4.[14/] Thus, while a policy against duplicative recoveries may be consistent with the "expansive remedial purpose" of Congress, it does not constitute that purpose.[15/] States may, therefore, enact laws,

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14/ In Illinois Brick, this Court served the remedial purpose of Congress by identifying direct purchasers as the persons most likely to discover antitrust violations and ensuring that they would have incentive to sue by allowing them to recover the full measure of their damages. However, the restrictions on indirect purchasers set forth in Illinois Brick do not operate as restrictions on the scope of otherwise legitimate state power. While the Illinois Brick decision may effectuate Congressional purpose, it provides no basis for concluding that Congress additionally intended to preclude the States from providing alternative remedies.

15/ The position of the Amici States is entirely consistent with the statement of this Court in California v. Zook, 335 U.S. 725, 731 (1949), that "the same act might, as to its character and tendencies, and the consequences it involved, constitute an offense against both the State and Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each." Thus, Zook would seem to permit a recovery to vindicate both State and federal rights in antitrust cases. This possibility underscores the fact that, in Illinois Brick, this Court was utilizing its own concerns to construe section 4 of the Clayton Act. It was not setting forth a statement of the purposes and objectives of Congress. See also Silkwood 464 U.S. at 257 (two different remedies, one federal and one (Continued)

based on policy considerations that differ from those articulated in Illinois Brick, which are also entirely consistent with Congressional purpose.[16/]

In McCready, this Court also stated that "in certain limited circumstances" it would construe section 4 in light of concerns in addition to the "broader remedial purpose of the antitrust laws." 457 U.S. at 475 n.11. Although these subordinate policies, such as avoiding complex damage cases, would facilitate judicial administration and might constitute valid considerations in deciding a particular case, this Court did not equate them with Congressional purpose.

In addition to the concerns about duplicative recoveries and complex damage theories, the court

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State, applied to same conduct).

16/ This Court's policy concerns should not be affected by State indirect purchaser statutes, for federal courts exercise discretionary authority over pendant State claims. See United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966). The federal courts may dismiss pendant state claims if they are deemed to complicate a trial unnecessarily or pose a threat to confuse a jury.

below was concerned about encouraging direct purchasers to become plaintiffs. Cement, 817 F.2d at 1446.[17/] Consistent with the "expansive" "broader remedial purpose" of Congress, this concern seeks to ensure that plaintiffs have an incentive to sue under federal law. This concern is in no way compromised by a State law that ensures that other plaintiffs will also have incentives to sue to enforce antitrust laws.

State indirect purchaser statutes, which permit a broader range of plaintiffs to enforce the antitrust laws, are in harmony with the Congressional purpose. Indeed, these state statutes directly address the purposes of Congress by providing incentives to additional private attorneys general, providing compensation to victims of antitrust violations, as well as providing strong disincentives to violate the antitrust laws. Read together with section 4, they

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17/ The McCready court was also concerned with this function of section 4 of the Clayton Act. See McCready, 457 U.S. at 475.

truly permit "any person who shall be injured in his business or property" to recover damages from antitrust wrongdoers. See 15 U.S.C. § 15. They enhance the Sherman Act's fundamental purpose of providing a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition." Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4 (1958).

C.

CONGRESS HAS IMPLICITLY VALIDATED STATE INDIRECT PURCHASER STATUTES BY SANCTIONING THE DISTRICT OF COLUMBIA'S ANTITRUST ACT.

Congress possesses ultimate power over the District of Columbia's local laws and may act to overturn proposed or extant District legislation.[18/]

18/ Congress has indeed overturned District local law on at least two occasion since "home rule" was granted to the District in 1973. See 127 Cong. Rec. Part 17, 97th Cong., 1st Sess. at 22,779 (1981) (Congressional disapproval of the Sexual Assault Reform Act); 93 Stat. 1435, 96th Cong., 1st Sess. (1979) (Congressional disapproval of the Chanceries Amendment Act of 1979).

Surely, if Congress had intended to give preemptive effect to section 4 of the Clayton Act it would have exercised this power over the District of Columbia's indirect purchaser statute. Yet, Congress has permitted the indirect purchaser statute in the District of Columbia's antitrust law to stand since its enactment in 1980. See D.C. Code Ann. § 28-4509.

The District of Columbia, created pursuant to Art I, § 8(17) of the Constitution, bears a special relationship to Congress. Under the District of Columbia Self-Government and Governmental Reorganization Act, Congress monitors and can veto legislative acts of the District government. Pub. L. 93-198, 87 Stat. 774 (1973); D.C. Code Ann. § 1-233.19/

19/ By the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973), D.C. Code §§ 1-201 et. seq., Congress delegated broad "home rule" powers to the District. Reserving certain enumerated exceptions not relevant here, every legislative act of the District is subject to a 30-day Congressional review period. D.C. Code § 1-233(c)(1). The act will become effective (Continued)

In 1980, the District of Columbia enacted its first District antitrust law. D.C. Code Ann. §§ 28-4501 et. seq. This statute contains an indirect purchaser provision virtually identical to those at issue here. D.C. Code Ann. § 28-4509. The Report of the Council of the District of Columbia to Congress contained particular reference to the rule of Hanover Shoe and Illinois Brick. Indeed, the Report explicitly stated that the District's indirect purchaser provision (§ 28-4509(a) of the Act) "makes clear that indirect purchasers can indeed seek damages for overcharges resulting from antitrust violations which are proven to have been passed on to them." (October 8, 1980, Report from David A. Clarke, Chairperson of the District's Committee on the Judiciary to members of The District Council, regarding Bill 3-107—The District of Columbia Antitrust Act of 1980—at p. 16).

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after the passage of the 30 days, so long as "both Houses of Congress do not adopt a concurrent resolution disapproving such act." Id. If an act is so vetoed, it becomes null and void. Id.

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
October Term, 1988

State of California, et al.
Appellants

v.

ARC America Corporation, et al.,
Appellees

On Appeal from the United States
Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE CONSUMERS UNION OF U.S., INC. IN SUPPORT OF APPELLANTS

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STATEMENT OF CONSENT

Consumers Union of United States, Inc., has obtained consent from all parties to submit this brief, these consent letters have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

Consumers Union is a non-profit membership organization which regularly engages in consumer advocacy before the executive, judicial and legislative branches of government. A longstanding part of Consumers Union's advocacy has been related to the promotion of competition in the marketplace. With this goal in mind, Consumers Union has repeatedly acted to help deter

anticompetitive conduct in order to increase consumer choice and welfare. In the area of antitrust, it has promoted the right of consumers to sue for antitrust violations.[1]

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[1]Consumers Union is a non-profit membership organization chartered in 1936 under the laws of the State of New York to provide information, education and counsel about consumer goods and services and the management of family income. Consumers Union's income is derived solely from the sale of Consumer Reports, its other publications and films. Expenses of occasional public service efforts may be met, in part, by nonrestrictive, noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, Consumer Reports, with approximately 3.5 million paid circulation, regularly carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

SUMMARY OF ARGUMENT

Section 4 of the Clayton Act should be one of the most potent deterrents to price fixing conspiracies. A rule permitting case by case analysis, and utilizing a presumption of injury to the direct purchaser, but which allows indirect purchasers to present evidence to rebut that presumption, would at once best further the goals of antitrust policy and be most consistent with Congressional intent. This flexible interpretation of section 4, combined with indirect purchasers suits under state statutes, would create the most effective method of ensuring consumers an efficient, competitive marketplace.

In denying a cause of action to indirect purchasers under section 4 of the Clayton Act, 15 U.S.C. section 15 (1982) in Illinois Brick Co. v. Illinois,

97 S. Ct. 2061, 2066 (1977), the Court stated it made the ruling,

> In the absence of a convincing demonstration that the Court was wrong . . . to think that the effectiveness of the antitrust action would be substantially reduced by adopting a rule that any party in the chain may sue to recover the fraction of the overcharge allegedly absorbed by it.

Amicus will offer a compelling argument that the effectiveness of antitrust treble damage actions will be substantially increased by adopting a rule that allows recovery by indirect purchasers not only under state law but also pursuant to federal law. Furthermore, such an approach is consistent with the three objectives of federal antitrust laws as identified by this Court in Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968) and Illinois Brick and by the lower court: avoiding unnecessarily

complicated litigation; providing incentives for private damage actions; and avoiding multiple liability for defendants.[2] Because consumers undeniably bear the burden of monopoly overcharges in the form of higher prices, a mechanism that allows them to be compensated should be available.

ARGUMENT

I. ALLOWING INDIRECT PURCHASERS TO RECOVER DAMAGES WHICH ARE THE RESULT OF MONOPOLY OVERCHARGES IS CONSISTENT SOUND ANTITRUST POLICY

A. Allowing indirect purchasers to recover for monopoly overcharges will not overly complicate treble damage actions.

Sound economic theory supports the presumption that at least some, and often

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[2] In re Cement and Concrete Antitrust Litigation, 817 F.2d 1435 (9th Cir. 1987).

most, of a monopoly overcharge is passed on.[3]

Principles of antitrust economics demonstrate that intermediaries in a chain of distribution will seek, to the maximum extent feasible, to pass on overcharges that result from anticompetitive conspiracies.[4] Furthermore, ultimate consumers most often pay the overcharges on products that are most likely to be price-fixed, particularly when the conspiracy is longterm.[5] In the case at bar, the conspiracy to fix the price of concrete was carried on for approximately twenty

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[3] Harris and Sullivan, Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis, 128 U. Pa. L. Rev. 269, 274 (1979).

[4] Schaeffer, Passing on Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis, 16 Wm. and Mary L. Rev. 883, 887-906 (1975.)

[5] Harris and Sullivan, supra note 3, at 317.

five years, beginning in 1951. In this situation, "on the basis of theoretical insights reinforced by institutional knowledge [it is possible] to make very reasonable estimates of passing-on rates, and to do so with limited amounts of data."[6]

Administrative forums, recognizing the realities of economics, regularly allow indirect purchasers to introduce proof of pass-on. The Department of Energy allows indirect purchasers of crude oil to prove that overcharges by crude oil producers were passed through to down stream purchasers by first purchasers. In In re Department of Energy Stripper Well Exemption Litigation, MDL No. 378 (D. Kan. May 7, 1985), a case dealing with

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[6] Harris and Sullivan, supra, note 3, at 287-290.

overcharges imposed by crude oil producers, the District Court determined that it was necessary to assess whether overcharges were passed through to down-stream customers. The court reasoned that, "allowing first purchasers to retain all of the overcharges, particularly in the absence of a factual showing that they did not pass on some or all of the overcharges, would not be an equitable result." The court was motivated to explain the necessity of tracing the overcharge although such an inquiry normally is not allowed under the rule of Illinois Brick. "The courts have generally refused to consider questions of passthrough in the former [civil] types of cases, reasoning that the difficulty of the task would discourage private litigants from seeking to vindicate their rights. In the present [government enforcement] case, however,

the court noted that there is no need to encourage private enforcement since this is, in effect, an enforcement action by the government."[7] The court did not shy away from the task of tracing the amount and effect of the overcharge nor describe it as, in fact, too difficult of an undertaking. The court implied that it is the perception of complexity that might frighten away plaintiffs.

Accurate methods are available to estimate the amount and effect of monopoly overcharges that are passed on through the chain of distribution.

An estimation of the degree of passing on that is likely to occur in a given industry can be made by analyzing the length of the conspiracy, the pricing methods, the directness of costs

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[7] In re Stripper Well Litigation, at 6.

affected by the monopoly overcharge, the elasticity of supply and the elasticity of demand.[8]

Economists regularly apply "incidence analysis" to determine the extent to which a cost increase is absorbed by firms in an industry and the extent to which it is passed on to consumers. This method, which measures the elasticity of supply and demand to determine the amount of pass-on that a market will absorb, is used satisfactorily in administrative forums.

In Hanover Shoe, this Court prohibited the use as a defense the fact that direct purchasers had passed on monopoly overcharges to indirect purchasers.

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[8] Harris and Sullivan, supra, note 5 at 309-321. Applying these factors to ready-mix concrete, the authors found a high probability of pass-on.

In the intervening period between Hanover Shoe and Illinois Brick several courts, interpreting Hanover Shoe as not excluding the offensive use of pass-on theory by plaintiffs, and when confronted with a particular factual setting, expressed the opinion that the overcharge could be traced.[9]

For the Court to disallow indirect purchasers as a class of plaintiffs is to ignore economic reality, and sacrifice equitable consumer redress in exchange only for the convenience of what amounts to a per se rule.

In other contexts, the Court has expressed distaste for rigid rules for

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[9] In re Master Key Antitrust Litigation [1973-2] Trade Cas. 74,680 (D. Conn.) appeal dismissed, 528 F.2d 5 (2d Cir. 1975); In re Sugar Indus. Antitrust Litigation, 73 F.R.D. 322, 350-55 (E.D. Pa. 1976); West Virginia v. Chas. Pfizer and Co., 440 F.2d 1079, 1086-88 (2d Cir.), cert denied, 404 U.S. 871 (1971).

the sake of simplicity when case by case inquiry may yield more equitable results. In refusing to apply a per se rule to vertical territorial restraints, the Court in Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977), held, "[o]nce established, per se rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule of reason trials . . . but those advantages are not sufficient in themselves to justify the creation of per se rules. If it were otherwise, all of antitrust law would be reduced to per se rules, thus introducing an unintended and undesirable rigidity in the law." But undesirable rigidity is indeed the result of the bar on indirect purchaser plaintiffs imposed by Illinois Brick. Two distinguished commentators have put it succinctly, "It is perhaps a worthy

goal to protect courts from tedium, but surely not at the cost of depriving parties injured by a blatant wrong from appropriate redress. With judicial capacity plainly existing, reluctance to exercise that capacity is not an appealing foundation for national policy." [10]

B. Allowing indirect purchasers a cause of action will result in greater deterrence of antitrust violators

The Court, in Illinois Brick, sought to further the dual policy objectives of deterring wrongdoers and empowering the most effective plaintiffs. Deterrence serves several purposes; preventing violations, depriving wrongdoers of "the fruits of their illegality"[11] and compensating victims

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[10] Harris and Sullivan, supra, note 3, at 339.

[11] Hanover Shoe, at 2232.

of antitrust violations. But all of these goals would be furthered by a rule that recognizes a cause of action for indirect purchasers when those purchasers can prove with reasonable certainty that they were injured by passed-on monopoly overcharges. Though the Court assumed that assigning the cause of action to direct purchasers would further this goal, there since has been developed little or no empirical evidence to bear out such an assumption.[12] Supporters of the Illinois Brick rule argue that in order to maximize deterrence, the cause of action for an overcharge must be assigned to that level of the distribution chain at which the number of purchasers is smallest, the organization costs are lowest, the level of

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[12] Harris and Sullivan, supra, note 3, at 349.

sophistication is greatest and the financial incentive of each purchaser to sue is the largest.[13] It is routinely assumed by them that these indicia identify the direct purchaser.

But this assumption ignores the fact that many direct purchasers have significant disincentives to sue. Many direct purchasers may be in actual collusion with the overcharging party, they may fear reprisals from the overcharging party and they may have long-term ongoing relationships with their suppliers that they are unwilling to disrupt. Indeed, when direct purchasers do sue, it tends to be in situations which the price-fixed

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[13] Posner and Landes, Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick, 46 U. Chi. L. Rev. 602, 608-615 (1979).

product is peripheral rather than central to the direct purchaser's business needs or in those in which the direct purchaser deals with several sellers at the cartelized level.[14] Moreover, direct purchasers are in a unique position to pass on the overcharge when market conditions allow.

Also ignored is the position of one of the most effective of all indirect purchaser plaintiffs, the states' attorneys general. In this case, state antitrust authorities uncovered the price- fixing conspiracy. If they are not allowed to recover on behalf of indirect purchasers, this will serve only to decrease the incentives to pursue enforcement actions.[15] It is, quite

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[14] Harris and Sullivan, supra, note 3, at 352.

[15] Appellant's Jurisdictional Statement at 11.

simply, bad policy to dissuade one of the most effective antitrust enforcement mechanisms in favor of a rigid rule, especially when state authorities are beginning to "assume an increasingly important role in keeping markets free from anti-competitive conduct."[15]

Those indirect purchasers who can prove they have borne the burden of an overcharge, as did the states in this case, will be more motivated to sue than will a direct purchaser who successfully passed on an overcharge. Under the Illinois Brick rule, a direct purchaser may successfully pass on an overcharge and then recover three times the amount of the overcharge in a treble damage action. Such a result is not consistent with an enunciated purpose of Clayton Act section 4, that of compensating victims

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[15] Appellant's Jurisdictional Statement at 10.

of antitrust violations for their injuries.[16]

This result is avoidable by allowing indirect purchaser plaintiffs, with convincing evidence of passed-on overcharges, to offer that evidence. A rule utilizing a rebuttable presumption of injury to the direct purchaser will help to avoid the situation in which a direct purchaser who successfully passes on an overcharge recovers the full amount of the overcharge and, hence, recovers a windfall. The net result of a more flexible rule will be to increase the potential number of effective plaintiffs.[17]

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[16] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

[17] The lower court cited the importance of providing incentives to sue to direct purchasers. However, this Court's true objective has been to maximize the number of plaintiffs with incentive to sue. See Appellant's Jurisdictional Statement at 14, note 16.

C. It is possible to compensate those actually injured by monopoly overcharges while avoiding multiple liability for defendants

The lower court reiterated this Court's concern that multiple liability for defendants be avoided. The unlikelihood of such a result in this case is apparent. In order for this to occur, the full overcharge imposed on all direct purchasers of cement would have to be recovered and trebled, and further, the recovery in at least one chain of distribution would have to exceed three times the amount of the overcharge to the direct purchaser in that chain.[18] When viewed in this manner, the danger that a defendant might incur liability beyond that contemplated by the statute does not seem to present such a

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[18] Harris and Sullivan, supra, note 3, at 344.

risk that antitrust policy should be based on such an anxiety. In fact, Congress rejected concern over multiple recovery as a basis for policy in enacting Hart-Scott-Rodino Act. [19]

A greater risk is that is that there will be successful suits by purchasers at two or more vertical levels which are duplicative because of inconsistent findings about the extent of pass-on.

Many procedural safeguards exist that can adequately protect against the risk that a defendant will be subjected to multiple or duplicative recovery. The short, four-year statute of limitations will offer some protection against excessive recovery. Cases involving common questions of fact can often be

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[19] S. Rep. No. 94-803, 94th Cong., 1st Sess. 44 (1976).

consolidated and transferred through the Judicial Panel on Multidistrict Litigation, as was done in the case at bar. The use of interpleader is also available. Collateral estoppel and res judicata will bind a party on certain issues of liability and pass on. During the period between Hanover Shoe and Illinois Brick, courts successfully utilized some of these mechanisms.[20]

An equally important adjunct to the concern that defendants not suffer multiple liability is that damages be properly apportioned, ensuring that victims of antitrust violations will be fairly compensated for their injuries. Granting the cause of action for the entire amount of the overcharge

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[20] See note 9, supra.

is fair if direct purchasers actually bear the burden of the overcharge. To the extent, however, that direct purchasers pass on these overcharges, it is not fair to deny recourse to those who actually suffer injury. Supporters of Illinois Brick will argue that much of the overcharge is ultimately born by the direct purchaser. But economics and practical pricing information indicate that passing-on is the rule, not the exception, even in the short run. When, however, the price-fixing conspiracy is long term, as in the present case, pass on is inevitable.[21]

There is an approach that fairly

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[21] Harris and Sullivan, supra, note 3, at 274.

would guard defendants against bearing an unfair burden, but that also would ensure that injured indirect purchasers have an adequate remedy. It is to allow indirect purchasers to assert pass-on affirmatively and then require that they bear the burden of proving the overcharge empirically or of proving facts upon which a presumption of passing on can be based.[22] There will, of course, always be a point at which the inquiry must cease, where the chain of distribution becomes too complex or where the product is incorporated as an indirect cost and tracing becomes too cumbersome. In most cases, however, courts are readily equipped to handle the task of tracing the amount of monopoly overcharge that

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[22] Harris and Sullivan, supra, note 3, at 348.

has been passed on to a specific purchaser.

II THE WILL OF CONGRESS IS FRUSTRATED BY A RULE THAT BARS INDIRECT PURCHASERS AS PLAINTIFFS IN CLAYTON ACT SECTION 4 SUITS.

Disallowing suits by indirect purchasers, such as this one by states' attorneys general for injuries suffered by indirect purchasers, frustrates the intent of Congress as expressed by its enactment of the antitrust laws in general and particularly by the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. sections 15C-15H (1976). This legislation sought to encourage suits on behalf of the states and their subdivisions as down-the-line purchasers and in parens patriae actions on behalf of state residents. The legislative history of the Act indicates that Congress intended to close a loophole in

section 4 of the Clayton Act by providing a mechanism to protect rights "which every consumer already has in theory, but which small consumers are in practice unable to exercise."[23]

The legislative history of the Act is littered with references to the fact that consumers most often bear the economic burden of antitrust violations, as most markets allow overcharges to be passed on. Clearly, Congress was acting with concern for the rights of the ultimate consumer.[24]

With the Illinois Brick rule in place, the only citizens for whom state attorneys general may seek relief are those that are direct purchasers. To restrict state parens patriae actions to

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[23] 122 Cong. Rec. H2065 (daily ed. Mar. 18, 1976).

[24] S. Rep. No. 94-803, 6, 39, 42, (1976).

those on behalf of direct purchasers all but eviscerates the effectiveness of such actions. Congress' intent in enacting Hart-Scott-Rodino was to expand the number of potential plaintiffs available to enforce the antitrust laws. It frustrates Congressional purpose to deny a motivated, injured plaintiff the opportunity to aid in assuring a more competitive marketplace.

CONCLUSION

It is clear that the amount of monopoly overcharges that is passed on to indirect purchasers can be traced with reasonable certainty. Furthermore, where the danger of multiple liability for defendants exists it can be avoided by the use of various procedural devices. The overriding concern of the Court in deciding Hanover Shoe and Illinois Brick

was to ensure that the antitrust laws would be efficiently and effectively enforced by plaintiffs with sufficient motivation to bring suit. This policy goal is best served by allowing indirect purchasers a cause of action not only under state law but also pursuant to section 4 of the Clayton Act.

A rule that allows indirect purchasers to sue pursuant to state law will go far to encourage private enforcement actions and thereby increase the competitivness of the marketplace. However, the overriding concern of the Court in Hanover Shoe and Illinois Brick was that the most effective enforcement mechanism be found. The rule that best serves this purpose is one that creates a rebuttable presumption of injury to the direct purchaser but allows an indirect purchaser to offer evidence that pass-on

occurred and to recover under section 4 of the Clayton Act where injury can reasonably be shown.

"If the law is serious about deterring monopoly pricing then it is counterproductive to designate as the only possible private attorney general the purchaser likely to have the least incentive to sue and the greatest incentive to preserve the status quo. Yet, Illinois Brick does precisely that."[25]

For the foregoing reasons, the decision of the Circuit Court of Appeals

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[25] Harris and Sullivan, supra, note 5, at 354.

is inconsistent with sound antitrust policy and with the intent of Congress and should be reversed.

Respectfully submitted

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AMICUS CURIAE

BRIEF

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Appellants,

v.

ARC AMERICA CORPORATION, *et al.*,
Appellees.

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BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS' ASSOCIATION, U.S. CONFERENCE OF MAYORS, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

Whether Section 4 of the Clayton Act preempts state remedies for antitrust injuries suffered by indirect purchasers.

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INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues affecting state and local governments.

The central issue of interest to *amici* in this case is whether the federal antitrust laws bar States from affording remedies to themselves and their citizens who have suffered antitrust injury as indirect purchasers, even where state legislatures have found a clear public interest to be served. *Amici's* concern is heightened by the damaging precedent to federalism that they believe would be established by a finding of preemption where Congress has expressed no intent to override state law; Congress has expressly enacted the federal antitrust laws to complement the States' own laws; and there is no showing that any substantive provision of state antitrust law conflicts, directly or indirectly, with comparable provisions of federal law.

In areas of traditional and critical state interest such as antitrust and consumer protection, preemption based on speculative impacts upon secondary and inferred congressional concerns would force the States to copy federal rights and remedies or do nothing at all.

The irony of this case is that it was a state investigation that led to the litigation creating a settlement fund that benefited private direct purchasers. Now the States are told that as indirect purchasers they and their citizens are entitled to no relief whatever under their own antitrust laws.

Amici respectfully submit that this result is not required by prior decisions of this Court, is erroneous, and should be reversed. Accordingly, *amici* and their members submit this brief to assist the Court in its resolution of this case.[1]

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[1] Pursuant to Rule 36 of the Rules of this Court, the parties' letters of consent have been filed with the Clerk.

STATEMENT OF THE CASE

This case arises from consolidated antitrust litigation filed by the States of California, Minnesota, Alabama, and Arizona and numerous private plaintiffs, following an investigation by the Arizona Attorney General's Office that revealed a nationwide price-fixing conspiracy among cement manufacturers. The States alleged violations of their own antitrust laws as well as of the Sherman Act. A settlement fund ultimately was created by agreement with certain defendants, and distribution of the fund was left subject to district court approval.

The district court held that the States and others had no right to compensation for overcharges on indirect purchases, and the court of appeals affirmed. The court of appeals relied primarily upon this Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which held that damages were not generally available to indirect purchasers under federal antitrust laws. The court below reasoned from *Illinois Brick* that state antitrust statutes providing for indirect purchaser recovery were preempted by the Clayton Act.

SUMMARY OF ARGUMENT

1. Congressional intent and this Court's decisions establish that the federal antitrust laws supplemented and did not supplant state antitrust and consumer protection laws. Where Congress has intended to preempt state antitrust laws, it has done so expressly; and where it has not done so, this Court has protected state policy initiatives. Federal and state remedies in these areas do not conflict merely because one goes further than the other.

2. This Court's decision in *Illinois Brick* does not hold that the States are barred from enacting indirect purchaser remedies or that there is any congressional policy against the States' doing so. Indeed, the *Illinois Brick*

opinion itself acknowledges: (a) that there are circumstances where indirect purchaser remedies are available even under federal antitrust law; (b) that Congress is free to enact remedies for all indirect purchasers; and (c) that indirect purchaser remedies, if enacted, would not be inconsistent with the basis objectives of the federal antitrust laws. If Congress could create, or correct the Court's denial of, such a remedy and not do damage to the Sherman Act, then the States should certainly be free to do so under their own statutes. Preemption is particularly inappropriate where, as here, the States are experimenting with the best means toward ends that are of traditional state concern and that are also shared by Congress.

3. The decision below is contrary to the Rules of Decision Act, which directs federal courts with jurisdiction over state law claims to respect state rights and remedies absent express preemption.

ARGUMENT

I. FEDERAL ANTITRUST LAWS SUPPLEMENT RATHER THAN PREEMPT STATE ANTITRUST LAWS

State common law and statutes created rights and remedies in the areas of antitrust, consumer protection, and unfair competition many years before the first federal initiatives in these areas. *See Business Electronics Corp. v. Sharp Electronics Corp.*, 108 S. Ct. 1515, 1523-25 (1988). The Sherman Act was not intended "to invade the legislative authority of the several States," *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56 n.19 (1985) (citation omitted). Instead, Congress perceived the need to supplement, not supplant, those state efforts with federal statutes directed at interstate commerce. 15 U.S.C. § 1; see 21 Cong. Rec. 2459 (1890) (statement by Sen. Sherman).

Thus, the federal antitrust laws do not purport to be exclusive (*see Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977)), or to occupy the entire field of consumer protection and the regulation of competition. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). It is not impossible for antitrust defendants to comply with both federal and state law (*see California Federal Savings & Loan Ass'n v. Guerra*, 107 S. Ct. 683, 694-95 (1987)), and federal and state antitrust laws are not in conflict merely because they differ. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141 (1963).

The particular preemption question here is whether, notwithstanding the general principle against preemption of state antitrust initiatives, state antitrust remedies for indirect purchasers somehow present an impermissible obstacle to the accomplishment of fundamental objectives of Congress. *See Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). As a general matter, this Court has been justifiably hesitant to find preemption of this type where Congress has explicitly allowed both federal and state regulation. *See Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 370 (1986). When dual regulation has been explicitly allowed, there is no preemption absent Congress' "clear and manifest purpose." *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 108 S. Ct. 1350, 1353 (1988).

The Court has recognized a strong presumption against implied preemption of historic state police power regulation, particularly where Congress has acted after the States and without expressly limiting the States' efforts. *See Puerto Rico*, 108 S. Ct. at 1353; *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985); *Florida Lime*, 373 U.S. at 146-47. Preemption analysis therefore turns on congressional intent (*see Louisiana Public Service Comm'n*, 476 U.S. at 369), and congressional silence should logically be deemed to con-

note assent to state efforts. The presumption against preemption becomes even stronger where, as here, Congress has not been silent but rather has expressly indicated that it has no desire to supplant state antitrust and consumer protection efforts. See 21 Cong. Rec. 2457 (1890) (statement by Sen. Sherman).[2]

In the antitrust context in particular, the Court has repeatedly recognized that Congress did not generally intend to preempt state statutes and has been reluctant to find implied preemption, "particularly [where] the basic purposes of the state statute and the [federal] Act are similar." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978); *see Watson v. Buck*, 313 U.S. 387, 403 & n.6 (1941). Where Congress has perceived that state laws might interfere with congressional objectives, it has expressly so stated. See National Cooperative Research Act, 15 U.S.C. § 4303(c); Export Trading Company Act, 15 U.S.C. §§ 4002(a)(7), 4016(a). Thus, Congress generally has sought to avoid preempting state antitrust and consumer protection laws and has expressly stated its intent in the specific instances in which it desires preemption.

The historical deference shown toward state policies in the area of competition is highlighted by this Court's finding of an implied intent by Congress to defer to state law even where that law appears to conflict directly with the basic purpose of the Sherman Act. Thus, in *Parker v. Brown*, 317 U.S. 341 (1943), the Court upheld California legislation that restricted competition and maintained prices—conduct otherwise central to the Sherman Act's prohibitions—as an "act of [state] government which the Sherman Act did not undertake to prohibit." *Id.* at 352. Based upon principles of comity and federalism, the Court held that it would "not lightly . . . attribut[e] to Congress" an "unexpressed purpose" to preempt such state activities. *Id.* at 351.[3]

[2] Congress has required federal cooperation with state antitrust enforcement. 15 U.S.C. § 15f (when the United States has reason to believe that a State would also have an antitrust cause of action, Attorney General must notify the State and share, to the extent otherwise permitted by law, investigative files and other useful materials). Congress has also restricted the application of federal antitrust laws to areas of commerce that have traditionally been closely regulated at the state level. McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15.

As the Court is well aware, *Parker v. Brown* has spawned a long line of cases exploring how far the States must go in affirmatively expressing and actively supervising state policy in order to avoid preemption. *See, e.g., Hoover v. Ronwin*, 466 U.S. 558, 567-69 (1984); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-06 (1980); *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791-92 (1975). These cases recognize the States' "freedom under our dual system of federalism . . . to administer state regulatory policies free of inhibitions of the federal antitrust laws." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978); see Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 Yale L.J. 486, 487 (1987).

In sum, Congress and this Court consistently have expressed an intention that federal antitrust law accommodate state policies and actions. Preemption of state antitrust enforcement efforts undermines this tradition of deference and should be avoided unless the state law remedies will "inevitably" frustrate the central objectives of the federal antitrust laws. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 218 (1985).

[3] Similarly, in *Kelly v. Kosuga*, 358 U.S. 516 (1959), the Court rejected a potential federal antitrust remedy that would require nonenforcement of a contract valid under state law because Congress had not explicitly required the remedy. *Id.* at 519, 521.

II. THE COURT'S DECISION IN *ILLINOIS BRICK* PROVIDES NO BASIS FOR INFERRING PREEMPTION OF STATE INDIRECT PURCHASER REMEDIES

A. Historical Background Of *Illinois Brick*

Federal antitrust law provides a remedy not only to the Government but also to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . ." 15 U.S.C. § 15 (a). In crafting that broad provision to enforce its "expansive remedial purpose" (*Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982)), however, Congress did not expressly deal with the situation in which one person suffers an injury to business or property but then passes that injury on to the next level in the chain of distribution.

In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), an antitrust defendant argued that plaintiff should not be allowed to recover damages because it had allegedly passed on any increased price when it resold the goods in question. Faced with the absence of express congressional determination, the Court attempted to ascertain what Congress would have done had it addressed the question. The Court concluded that denying a remedy to direct purchasers would eliminate a significant category of potential private attorneys general—a result inconsistent with the congressional desire for vigorous enforcement of the statute—and would complicate federal antitrust litigation. The Court, however, did not conclude that Congress intended to preclude absolutely the passing-on defense, but rather that a defendant asserting this defense would be required to satisfy a high burden of proof. *Id.* at 494.

In *Illinois Brick*, the Court faced a related question: whether an indirect purchaser could recover antitrust damages for an overcharge passed on by a direct purchaser. Again, in the absence of an express statutory resolution of the issue, the Court attempted to infer what Congress would have done had it dealt with the question. Allowing recovery by indirect purchasers would have been consistent with the congressional desire for vigorous antitrust enforcement, but defendants argued that such indirect purchaser recoveries posed the risk of increased complexity and multiple trebled damages for the same overcharge. 431 U.S. at 728-29.

In ultimately deciding to limit the standing of indirect purchasers, the Court relied heavily upon *stare decisis* (431 U.S. at 736), as well as the factors of judicial economy and deterrence. Nonetheless, the Court did not infer a desire by Congress to preclude all indirect purchaser recoveries. Instead, the Court set a demanding burden of proof and identified situations in which such a burden might be satisfied. *Id.* at 736 & n.16.

The effect of the *Illinois Brick* decision has been unpopular with state and local governments because it effectively precludes federal antitrust damage recoveries by governmental and consumer end-users who are believed to be the ultimate victims of illegal price fixing and bid rigging. Many States have enacted so-called "*Illinois Brick* statutes" allowing indirect purchasers to recover under state antitrust laws. At least two States have pre-*Illinois Brick* statutes that explicitly allow recovery whether the injury is "direct or indirect" (Ala. Code § 6-5-60(a) (1977); Miss. Code Ann. § 75-21-9 (1987)), and Arizona has determined that the general remedy provision of its antitrust laws resulted from the same intent. These are the statutes that the decision below nullifies.

The court of appeals concluded that States must restrict their remedies for antitrust violations affecting interstate commerce to those that this Court deemed Congress to have intended under federal antitrust law. The

Ninth Circuit supported its reasoning by examining the various concerns identified in *Hanover Shoe* and *Illinois Brick* and determined that there were scenarios in which those concerns might be implicated by the application of differing state and federal remedies by a federal court with jurisdiction over both types of claims. This analytical framework and ultimate conclusion are in error.

B. *Illinois Brick* Did Not Apply Preemption Analysis

In crafting a statutory scheme, Congress necessarily chooses from among various alternative means for accomplishing its fundamental objectives. Selection of one means, particularly when that selection is done by this Court in the absence of explicit congressional direction, does not constitute a determination that some other means would not accomplish the same objectives, much less that they would be an obstacle to their accomplishment.

Preemption analysis instead must focus on the affirmative objectives that Congress was attempting to achieve with a particular statute. That federal law tolerates certain conduct does not mean that federal policy affirmatively encourages it or preempts state power to prohibit it. *See Exxon Corp.*, 437 U.S. at 132. Negative and subsidiary concerns, such as avoiding unnecessary judicial complications or the imposition of more punishment than is specifically provided under federal law, should seldom if ever be interpreted as implicitly preempting different judgments by state legislatures as to the best means to the end and the amount of justifiable or necessary judicial inconvenience or additional punishment.

Congress' express intent in enacting the Sherman Act was not to simplify litigation or to limit the liability of businesses. "[T]he policy unequivocally laid down by the Act is competition." *Northern Pacific Railway Co. v.*

United States, 356 U.S. 1, 4 (1958). *Accord Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940); *Standard Oil Co. v. United States*, 221 U.S. 1, 59-61 (1911). Surely, if federalism requires that the basic federal objective give way when a State has clearly articulated and actively supervised an inconsistent state policy (*Parker v. Brown*, *supra*), then Congress could not have intended to preempt state laws that expressly articulate and actively supervise a supplementary means of accomplishing Congress' own objective.

In *Illinois Brick*, this Court did not conclude that denial of remedies to indirect purchasers was necessary to the accomplishment of Congress' basic objectives, only that it seemed more likely that Congress would have made direct purchasers the primary mechanism for private enforcement against price fixers. This Court concluded, in effect, that there was no clear need to add the general category of indirect purchasers as antitrust plaintiffs, particularly because it could be presumed that Congress would hesitate to complicate court proceedings and to impose even greater punishment unless that was necessary to encourage private enforcement and voluntary compliance.

Although the Court in *Illinois Brick* was not convinced that an increase in judicial inconvenience and defendant punishment was necessary to effective enforcement, it left open the possibility that Congress might disagree or that, in specific circumstances, the Court might deem such costs necessary or at least manageable. Thus, the rationale of *Illinois Brick* plainly does not present a bar to a different judgment about necessary or desirable antitrust remedies either by Congress or by the States. This is particularly true where the States share the same objectives as Congress but merely have made a different choice of means to accomplish these goals than that made thus far by Congress. *See Exxon Corp.*, 437 U.S. at 133. Indeed, it is almost a cliche of federalism that the States should be free to experiment with different means so that

by acting as laboratories for public policy they can help Congress determine how to refine its own efforts to best accomplish desirable ends.[4] In this case, for example, the States' experience with plaintiffs who are indirect purchasers indicates that they contribute substantially to private enforcement and that any increased complexity of adjudication is minimal.[5]

In *Illinois Brick*, the Court was reluctant to expand the statutory remedy if there were some reason that Congress might not have intended to go that far. The test for preemption, however, is not whether Congress might have had some reason not to provide a remedy but quite the opposite: whether the overall congressional scheme would be frustrated if the States chose to do so. Although the Court might hesitate to imply a remedy for violation of federal law absent a clear expression of con-

[4] It has been suggested that the best measure of the effects of different regimes of antitrust enforcement is created by differences across time and in different countries. Reynolds, *The Economics of Antitrust Enforcement: Theory and Measurement*, 68 Geo. L.J. 1121, 1129 (1980). As States have moved to the forefront of antitrust enforcement in this country (see, *e.g.*, Brockmeyer, *State Antitrust Enforcement*, 57 Antitrust L.J. 169 (1988)), the same can now be said of variations in state approaches.

[5] In the analogous area of overcharges under federal oil price controls, federal courts also have recognized that modern economic and statistical tools such as incidence and regression analysis allow the effects of an overcharge to be tracked with reasonable accuracy through the distribution system. *See United States v. Exxon Corp.*, 561 F. Supp. 816 (D.D.C. 1983), *aff'd*, 773 F.2d 1240 (TECA 1985), *cert. denied*, 474 U.S. 1105 (1986); *In re Dept. of Energy Stripper Well Exemption Litigation*, 578 F. Supp. 586, 593-96 (D. Kan. 1984). See also Harris & Sullivan, *Passing On The Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. Pa. L. Rev. 269, 287-90 (1979). See also T. Bartsh, F. Boddy, B. King, & P. Thompson, *A Class Action Suit That Worked* (1978) (describing methodology for distribution of settlement proceeds to indirect purchasers).

gressional intent,[6] the Court routinely presumes that the States are entitled to act unless Congress has explicitly directed them not to or unless their actions would actually frustrate the basic congressional objective.[7] "In this as in other areas of coincident federal and state regulation, the teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists." *Exxon Corp.*, 437 U.S. at 130 (citations and internal quotations omitted).

C. Allowing A State Remedy For Indirect Purchasers Does Not Frustrate Federal Antitrust Policy

The States' initiatives here present no obstacles whatever to the Sherman Act's policy of vigorous competition. Federal antitrust enforcement will not suffer if States provide remedies to indirect purchasers under state law. Such state law remedies do not protect conduct prohibited by the Sherman Act or directly impede the implementation of the federal remedies. *See Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 176-77 (1942). Even assuming that streamlining adjudication is an affirmative congressional policy underlying the federal antitrust laws, the obvious solution is for the federal courts to decline pendent jurisdiction over state law claims that would unduly complicate the litigation—not to preclude those claims on federal constitutional grounds.[8] The factors that govern the discretionary deci-

[6] *See, e.g., Touche Ross & Co. v. Redington*, 442 U.S. 560, 571 (1979) ("implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best").

[7] Indeed, before Congress added a statute of limitations to the Clayton Act, 15 U.S.C. § 15b, the federal courts turned to the remedy provisions of state law on the presumption that they would best serve the intent of Congress. *See, e.g., Schiffman Bros. v. Texas Co.*, 196 F.2d 695, 696 (7th Cir. 1952).

[8] It appears that the district court properly exercised pendent jurisdiction over the indirect purchaser plaintiffs, even though they alleged only state law claims, because of exclusive federal jurisdiction over the Sherman Act claims of direct purchasers relating to

sion regarding pendent jurisdiction—judicial economy, convenience, and fairness to the litigants—will generally resolve the concerns that the Ninth Circuit identified in this case. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

Sending indirect purchasers back to state court might increase the possibility of multiple liability. The Court in *Hanover Shoe* and *Illinois Brick* did not suggest, however, that Congress has expressed any intent to limit potential multiple antitrust liability within the federal system. Indeed, Congress created federal civil liability even though many States already provided civil liability for exactly the same conduct. Moreover, Congress determined that the remedy for civil liability under the federal antitrust laws should not be limited to compensation for the private plaintiff's injury but should include mandatory treble damages and reasonable attorney's fees. 15 U.S.C. § 15(a). Congress has gone beyond even these extensive private remedies to provide public enforcement through damages and injunctive actions and criminal liability, including the possibility of both imprisonment and substantial fines. 15 U.S.C. §§ 15a, 24, 25.

Congress determined that it was necessary to threaten price fixers already subject to state civil and criminal remedies with federal equitable remedies and civil damages, including trebled damages, and with federal criminal sanctions. That determination rebuts any inference that the objectives of federal antitrust law would be frustrated by allowing States to provide a remedy to an additional group of plaintiffs. As this Court has observed, there is no general federal policy prohibiting cumulative

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the same transactions and occurrences. *See Aldinger v. Howard*, 427 U.S. 1, 17-18 (1976). Where there is exclusive federal jurisdiction of federal claims and judicial economy calls for consolidated litigation of related state law claims, States and other state law plaintiffs have little choice as to forum. In that situation, federalism and comity impose a special obligation on federal courts and federal law to respect substantive state law provisions.

punishment through federal and state liability and remedy. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256-57 (1984); *see California v. Zook*, 336 U.S. 725, 736 (1949). In fact, the Court has held that dual sovereignty, as an aspect of federalism, precludes an inference that federal criminal penalties prevent the States from imposing additional penalties for the same conduct. *Bartkus v. Illinois*, 359 U.S. 121, 137 (1959). That the States may punish the same act as the federal government "is too plain to need more than statement." *Westfall v. United States*, 274 U.S. 256, 258 (1927).

Something close to a substantial conflict with federal law could perhaps arise if Congress had clearly indicated that double treble liability would be a punishment so harsh that it might chill valid business conduct and the States were applying their laws in a fashion that actually resulted in double treble liability. But Congress has not so indicated; and there is no reason to believe that some punishment between treble and sextuple liability will deter businesses from lawful, aggressive competition. The type of conduct that gives rise to indirect purchaser claims, "hard core" price fixing, is not the kind of business activity that falls within a grey area between aggressive competition and anticompetitive conduct.[9] More-

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[9] In some areas, there is a thin line between the aggressive competition that the antitrust laws encourage and the unfair or anticompetitive conduct that they prohibit. Lawful competition by a company without market power may be unlawful if undertaken by a firm with or dangerously close to monopoly power. *See, e.g., Lorain Journal Co. v. United States*, 342 U.S. 143, 155 (1951). Claims raising such concerns are typically brought by competitors, not purchasers. Indirect purchasers have claims that arise from price fixing. Even those who have questioned whether treble liability might chill pro-competitive conduct have not generally suggested that such a risk applies to price-fixing cases. See, *e.g.*, House Comm. on the Judiciary, 98th Cong., 2d Sess., *Study of the Antitrust Treble Damage Remedy* (Comm. Print 1984); Easterbrook, *Detrebling Antitrust Damages*, 28 J.L. & Econ. 445 (1985); K. Elzinga & W. Breit, *The Antitrust Penalties: A Study in Law and Economics* (1976). Price fixing is one of those per se violations that "always

over, at least in this case, the States have sought to have the settlement fund administered in a fashion that avoids duplicative recoveries for the same overcharge.

The Ninth Circuit's additional rationale that settlements would be encouraged by denying indirect purchaser claims under state statutes is also in error. The Ninth Circuit reasoned that if defendants have a fixed amount of money available to settle civil antitrust claims and if the States create a new category of plaintiffs and claims with which defendants must deal, then defendants either will be unable to settle or will offer somewhat less to the federal-claim plaintiffs. Because the judicial policy in favor of settlements is not unique to the antitrust laws, the Ninth Circuit's reasoning would preempt all state statutes providing private remedies that overlap with federal private remedies. Moreover, the defendant's incentive to obey the law and to settle remains the same. At worst, the same amount of money is divided up among different claimants. The incentive to obey the law and to settle is even greater for defendants who do not have a fixed amount of money available for this purpose,[10] and, in the

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or almost always tend to restrict competition and decrease output." *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979). Indeed, it has been suggested that for "garden variety" covert price fixing, the type of violation that injures indirect purchasers, the damages multiple might be increased to quadruple or beyond. See *Individual Treble Damage Liability: Hearings on S.1300 Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985) (statement of Charles F. Rule, Assistant Attorney General, Antitrust Division). Moreover, increasing the possible recovery tends to increase the parties' expenditures to gather and analyze the historical and economic evidence, leading to reduction in "the twin costs of erroneously deterring efficient business conduct and erroneously permitting inefficient conduct." Salop & White, *Economic Analysis of Private Antitrust Litigation*, 74 Geo. L.J. 1001, 1035 (1986).

[10] This point follows from the analysis set out in Salop & White, *Economic Analysis of Private Antitrust Litigation*, 74 Geo. L.J. 1001 (1986). Although there are many complicating factors not addressed by the Ninth Circuit, increasing the defendant's follow-on costs from a loss at trial tends to increase settlement rates. *Id.* at 1027. Although increasing the stakes for a single optimistic plaintiff tends by itself to reduce the chances of settlement, in this situation the original plaintiffs' stakes do not change; there is instead a new class of plaintiffs seeking the increased award against the defendant.

real world, defendants seldom have fixed pots of money available for settlement.

The Ninth Circuit's assumption that defendants in this case would have paid the same amount to the direct purchasers absent the indirect purchaser claims is economically unsupportable. Because the defendants sought the release of the indirect purchaser claims, the only rational economic assumption is that they were willing to and did pay something more for that release. Similarly, because the direct purchaser plaintiffs were willing to accept the settlement knowing that the indirect purchaser claims were included, the only rational assumption is that the direct purchasers were willing to take something less than the full amount for their claims, *i.e.*, the full amount less the value of the chance that indirect purchasers would obtain a share of the settlement pool.

III. THE DECISION BELOW IS CONTRARY TO THE RULES OF DECISION ACT

Even assuming that the Ninth Circuit's analysis of judicial inconvenience and multiple liability were well founded as a matter of general public policy, the decision below is directly contrary to Congress' explicit directive that "[t]he laws of the several states, except where the Constitution, or treaties of the United States, or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652. The Rules of Decision Act, Section 34 of the Judiciary Act of 1789, 1 Stat. 92, predated the Sher-

man Act by a century. The statute is a plain expression of congressional intent that state law, which includes state remedies, shall control the adjudication by federal courts of state law claims unless Congress has required or provided to the contrary.[11]

The Ninth Circuit's decision is an unfortunate return to the discredited rationale of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), that the law "may be truly declared" only by imposing uniformity. *Id.* at 19. The reasoning followed by the Ninth Circuit, like the rule of *Swift v. Tyson*, is "an unconstitutional assumption of powers by the Courts of the United States" to impose rules of law in areas within the exclusive or concurrent jurisdiction of the States. *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

CONCLUSION

For these reasons, the judgment below should be reversed.

Respectfully submitted,

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November 30, 1988

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[11] The Supremacy Clause itself does not provide "to the contrary," for the Rules of Decision Act would be a nullity if read to require, in a circular fashion, that state law should not be regarded as the rule of decision whenever state law varied from federal law.

AMICUS CURIAE

BRIEF

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No. 87-1862

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

STATE OF CALIFORNIA, *et al.*,
Appellants

v.

ARC AMERICA CORPORATION, *et al.*,
Appellees

On Appeal from the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE BUSINESS ROUNDTABLE AS AMICUS CURIAE SUPPORTING APPELLEES

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BRIEF FOR THE BUSINESS ROUNDTABLE AS AMICUS CURIAE SUPPORTING APPELLEES

INTEREST OF AMICUS CURIAE

The Business Roundtable is an association of about 200 member companies represented by their chief executive officers. These substantial companies are widely dispersed by type of business and geographic location. The companies represented in The Business Roundtable are substantial producers and consumers of goods and services who believe it is critical that the marketplace operate competitively. They are, therefore, vitally interested in the effective enforcement of the antitrust laws.[1]

[1] Pursuant to Rule 36.2 of the Rules of the Supreme Court, this brief is filed with the consent of both appellants and appellees. Copies of letters of consent from both parties are being filed herewith.

The Business Roundtable has actively participated in the national debate concerning indirect purchaser standing since this Court's decision in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977). The Business Roundtable has long believed that effective enforcement of the antitrust laws is best insured if direct purchasers are permitted to recover the full amount of any claimed overcharges. State statutes that give indirect purchasers standing to sue for damages threaten to undermine the federal antitrust policy described in *Illinois Brick*.

The parties have necessarily devoted their principal attention to the constitutional issues under the Supremacy Clause, U.S. Const. art. VI. The Business Roundtable concurs in appellees' views on those issues and discusses those issues below only briefly. This brief is principally intended to provide the Court with a practical perspective on the problems created by indirect purchaser actions under the California law at issue in this case.[2]

SUMMARY OF ARGUMENT

This Court has held in many cases that federal antitrust law and policy preclude duplicative recovery of treble damages for antitrust law violations. That policy was most clearly articulated in *Illinois Brick*, where the Court relied on it to hold that in most cases only a direct purchaser from a defendant may sue for damages caused by the violation claimed. The federal policy against multiple recoveries is frustrated by state laws that authorize indirect purchasers to sue for damages caused by violations of state antitrust laws. The same conduct may give rise to claims under both federal and state law. By suing in state court in a state whose statutes authorize indirect purchaser actions, an indirect purchaser can avoid *Illinois Brick* and subject the defendant to the prospect of multiple liability for antitrust law violations. This is contrary to the federal antitrust policy articulated in *Illinois Brick*, and, therefore, state laws authorizing antitrust damage actions by indirect purchasers should be found to be preempted by federal law.

[2] In a preemption case, the "inquiry requires [the Court] to consider the relationship between state and federal laws as they are interpreted and applied, not merely as written." *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 526 (1977).

Actual experience with the California indirect purchaser statute demonstrates the conflict between state law and federal antitrust policy. The California courts have refused to utilize procedural devices, such as compulsory joinder, that might avoid multiple liability. Indeed, although indirect purchasers in California may claim damages for overcharges that were allegedly passed on to them, it is not clear that the California courts will permit the defendant in an indirect purchaser action to assert a pass-on defense. Because the California state antitrust law has been applied to interstate commerce, its scope is potentially almost as broad as that of the Sherman Act, which means that opportunities for duplicative liability are virtually limitless.

ARGUMENT

I. THE CONFLICT BETWEEN FEDERAL ANTITRUST POLICY AND STATE LAW REQUIRES PREEMPTION.

A. Federal Antitrust Policy Prohibits Duplicative Recovery.

In *Hanover Shoe* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), this Court held that a defendant in an action under Section 4 of the Clayton Act, 15 U.S.C. § 15, could not claim that the plaintiff suffered no injury because it passed on the illegal overcharge to its customers. The Court was concerned that efforts to trace the overcharge through the distribution chain would further complicate already complicated and protracted litigation by requiring proof of what the price at each level of distri-

bution would have been absent the illegal conduct. *Id.* at 492-93. The Court also feared that the availability of a pass-on defense could undermine the effectiveness of private treble damage actions by private attorneys general who enforce the antitrust laws. *Id.* at 494.

Nine years later, the Court "decline[d] to abandon the construction given § 4 in *Hanover Shoe*—that the overcharged direct purchaser, and not others in the chain of manufacture and distribution, is the party 'injured in his business or property' within the meaning of the section. . . ." *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 729 (1977). The Court re-emphasized the reasoning of *Hanover Shoe* concerning litigation complexity and undermining the effectiveness of private treble damage actions. *Id.* at 731-33, 737-41. But the Court also based its decision on the ground that duplicative recoveries violate the policy underlying Section 4 of the Clayton Act:

> [A]llowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants. Even though an indirect purchaser had already recovered for all or part of an overcharge passed on to it, the direct purchaser would still recover automatically the full amount of the overcharge that the indirect purchaser had shown to be passed on; similarly, following an automatic recovery of the full overcharge by the direct purchaser, the indirect purchaser could sue to recover the same amount. [*Id.* at 730].

Citing *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 264 (1972), the Court held that it was "unwilling to 'open the door to duplicative recoveries' under § 4." *Id.* at 731. The Court explicitly rejected arguments that various procedural devices—such as compulsory joinder, interpleader, and consolidation—could minimize the risk of multiple liability. Recognizing that the risk of duplicative recovery could not be completely eliminated by these procedural devices, the Court stated, "we do not find this risk acceptable." *Id.* at 731 n.11.

The Court in *Illinois Brick* thus identified the avoidance of multiple liability as a compelling policy underlying the federal antitrust laws. Other decisions of this Court also refer to the federal policy against duplicative recoveries. As noted above, it has its roots in *Hawaii* v. *Standard Oil Co.*, where the Court held that Hawaii could not sue under Section 4 of the Clayton Act for damages to its general economy on the ground, *inter alia*, that to allow such actions would "open the door to duplicative recoveries." 405 U.S. at 264. In *Blue Shield of Virginia* v. *McCready*, the Court referred to the "statutory policy" precluding a risk of duplicative recovery. 457 U.S. 465, 473-74 (1982).

In *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, the Court again referred to "the policy against duplicative recoveries." 459 U.S. 519, 545 (1983). In his dissent in *Associated General Contractors*, Justice Marshall discussed the federal "*statutory policy* underlying this Court's decisions in *Illinois Brick* and *Hawaii* v. *Standard Oil Co.*" *Id.* at 549 (emphasis added) (citations omitted). He concluded that:

> Critical to the denial of standing in those cases was the risk of duplicative recovery that would have been created by affording the plaintiffs standing. * * * Significantly, *the risk of duplicative recovery that the Court relied on in both* Illinois Brick *and* Hawaii v. Standard Oil Co. *is not a judicially invented reason for restricting the broad scope of § 4. Permitting two recoveries based on the very same injuries would be contrary to the basic statutory scheme governing damages actions*, for the result would be to subject antitrust defendants to sextuple-damages awards rather than the treble-damages awards that Congress contemplated. [*Id.* at 549-50 & n.7 (Marshall, J., dissenting) (emphasis added) (citations omitted)].

The *Associated General Contractors* majority did not differ with Justice Marshall's characterization of the

statutory policy against duplicative recovery. On the contrary, as noted above, the majority also referred to that policy.

Most recently, in *Cargill, Inc.* v. *Montfort of Colorado, Inc.*, the Court stated:

> The treble-damage remedy, if afforded to "every person tangentially affected by an antitrust violation," . . . or for "all injuries that might conceivably be traced to an antitrust violation," . . . would "open the door to duplicate recoveries," and to multiple lawsuits. In order to protect against multiple lawsuits and duplicative recoveries, courts should examine other factors in addition to antitrust injury, such as the potential for duplicative recovery, the complexity of apportioning damages, and the existence of other parties that have been more directly harmed to determine whether a party is a proper plaintiff under § 4. [479 U.S. 104, 111 n.6 (1986) (citations omitted)].

Thus, many decisions of this Court establish that there is a significant federal antitrust policy against duplicative recovery.

B. State Indirect Purchaser Statutes Frustrate Federal Antitrust Policy.

There is no doubt that if indirect purchasers can recover damages under state antitrust laws, defendants are likely to face the duplicative recovery that this Court has found precluded by the federal antitrust laws.[3] Indeed,

[3] Appellants claim that Minnesota law "requires" the court to prevent duplicative liability. Appellants' Brief at 34. In fact, the Minnesota statute provides that in any "subsequent action," the court "*may* take any steps necessary to avoid duplicative recovery against a defendant." Minn. Stat. § 325D.57 (1986) (emphasis added). The statute appears to give the court discretion whether to take steps to prevent duplicative liability, it does not indicate what steps are appropriate, and no Minnesota case law interprets the provision. Thus, it is not at all clear that the Minnesota statute prevents duplicative liability. If, for example, a direct purchaser has already recovered treble damages in a federal court action, any recovery by an indirect purchaser in an action under the Minnesota statute would be duplicative. It is not apparent how the Minnesota statute would prevent duplicative liability in that situation. Moreover, none of the other statutes at issue even purports to prevent duplicative liability.

the United States concedes that "some or all of the indirect purchaser claims in this case are duplicative of direct purchaser claims" and that the state statutes create "additional liability for the same conduct." United States' Brief at 20 & 22 n.16. *Accord*, Brief of Amici National Conference of State Legislatures et al. at 14. The direct purchaser is deemed to have suffered all damages for purposes of federal law and is entitled to recover the full amount of the overcharge, not just the portion it absorbed and did not pass-on.[4] The defendant in the federal action is precluded by *Hanover Shoe* from claiming that the direct purchaser passed on any portion of the overcharge. But an indirect purchaser suing under state law may also recover the overcharge passed on to it by the direct purchaser. Thus, the indirect purchaser can recover additional damages from the same defendants based on the same underlying conduct. Depending on the state statute, state law may even allow recoveries by indirect purchasers at various distribution levels, each

[4] Contrary to the fears of the *Illinois Brick* dissenters (431 U.S. at 749 (Brennan, J., dissenting)), as well as appellants and some of the amici supporting them (Appellants' Brief at 39-40; Consumers Union Brief at 15-16), direct purchasers usually sue to recover damages caused by price fixing by their suppliers. An independent study by the Antitrust Section of the American Bar Association concluded that "direct purchasers do sue irrespective of ongoing supplier relationships, that these suits are sufficiently common, and that the threat of suit serves as a deterrent." *Report of the American Bar Association Section of Antitrust Law Task Force to Review Proposed Legislation to Repeal or Modify Illinois Brick*, 52 Antitrust L.J. 841, 863-68 (1983).

claiming that the entire amount of the overcharge was absorbed at that distribution level.[5]

For example, if there had been indirect purchaser standing under state law in the late 1960s, manufacturers of plumbing fixtures who were alleged to have fixed prices could have been subjected to damage actions by multiple levels of purchasers: actions under the federal antitrust laws by the direct purchaser wholesalers and actions under state antitrust law by several layers of indirect purchasers—plumbing contractors who installed the plumbing fixtures in new homes, general contractors for whom the plumbing contractors performed work, initial purchasers of new homes, and possibly each subsequent purchaser of the homes and even lessees if the houses were rented. *Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp.*, 50 F.R.D. 13, 25-26 (E.D. Pa. 1970), *aff'd sub nom. Mangano* v. *American Radiator & Standard Sanitary Corp.*, 438 F.2d 1187 (3d Cir. 1971).

Although this example may seem improbable, it actually occurred and could occur again because state statutes such as those at issue permit such litigation. None of those statutes on their face would preclude actions by multiple layers of direct purchasers, each claiming that

[5] Appellants argue that there may be no duplicative recovery because "[i]nsofar as a recovery by a direct purchaser under federal law represents the portion of the overcharge it actually incurs, that amount has not been passed-on to downstream purchasers, and is *not* duplicated in any award to a downstream purchaser under states' laws." Appellants' Brief at 33-34 (emphasis in original). But that argument only says that there may not be *total* duplication between the federal and state award. There almost always will be at least some duplication because the defendant cannot assert a pass-on defense in the federal action and the direct purchaser plaintiff can recover for both any overcharges passed on to indirect purchasers and overcharges it absorbed. Appellants' argument is accurate only if the direct purchaser sues only for the portion of the overcharge it absorbed.

it fully absorbed the overcharge.[6] Thus, state indirect purchaser statutes create an obvious risk of duplicative recovery or even multiple recovery.

C. Preemption Is Required When State Laws Frustrate Federal Policy.

It is well established that Congress can preempt state law either expressly or by implication. "Even where Congress has not entirely displaced state regulation in a specific area, state law is pre-empted to the extent that it actually conflicts with federal law. Such a conflict arises . . . where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 204 (1983) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)).

Thus, while Congress has neither expressly preempted state antitrust laws granting indirect purchaser standing nor regulated so pervasively that there is no room for state antitrust regulation, preemption should be found because the federal policy against duplicative recovery is frustrated by state indirect purchaser statutes. This Court has previously concluded that federal antitrust policy can constitute a basis for preemption of state antitrust law. In *Flood* v. *Kuhn*, 407 U.S. 258 (1984), the

[6] The state statutes at issue generally authorize actions for damages by "any person" injured directly or indirectly by a violation of state antitrust law. Alabama Code § 6-5-60 ("Any person . . . injured or damaged by an unlawful trust combine or monopoly, or its effect, direct or indirect . . ."); Cal. Bus. & Prof. Code § 16750(a) ("This action may be brought by any person who is injured in his business or property . . . regardless of whether such injured person dealt directly or indirectly with the defendant"); Minn. Stat. § 325D.57 ("Any person . . . injured directly or indirectly . . ."). Thus, the language of the statutes at issue appears to permit actions by multiple levels of indirect purchasers, perhaps even purchasers far removed from the alleged conspirators.

Court held that long-standing federal policy created a *de facto* exemption from the federal antitrust laws for professional baseball. That finding did not fully dispose of the plaintiff's claim, however, since Flood had also sued under state antitrust law. This Court adopted the district court holding that the state antitrust laws regulating professional baseball were preempted by federal antitrust law. *Id.* at 284. Thus, in *Flood* v. *Kuhn*, this Court held that federal antitrust policy preempted state antitrust laws.

Here, as in *Flood* v. *Kuhn*, this Court should find that the policy underlying the federal antitrust laws preempts state antitrust laws. This Court has held that the risk of duplicative recovery as a consequence of indirect purchaser standing is not "acceptable" and violates federal antitrust policy. *Illinois Brick*, 431 U.S. at 730-31 & n.11. That federal antitrust policy is undermined by state statutes that permit antitrust damage actions by indirect purchasers and create significant risks of duplicative recovery. As a result, the Court should affirm the decisions of both the district court and the Ninth Circuit that state statutes granting indirect purchaser standing are preempted by federal antitrust law.

II. EXPERIENCE WITH STATE INDIRECT PURCHASER STATUTES DEMONSTRATES THAT THEY UNDERMINE FEDERAL ANTITRUST POLICY.

The dissenters in *Illinois Brick* acknowledged the problems identified in the majority opinion, but they believed those problems could be adequately addressed through procedural mechanisms. 431 U.S. at 761 (Brennan, J., dissenting). They believed that the risk of duplicative liability could be minimized by allowing defendants to assert pass-on defenses and through such means as statutory interpleader, intradistrict or interdistrict transfers pursuant to 28 U.S.C. § 1404, coordinated pretrial proceedings under 28 U.S.C. § 1407, or compulsory joinder.[7] *Id.* at 762-63. But experience under state indirect purchaser statutes demonstrates that the solutions the *Illinois Brick* dissenters envisioned are either inadequate or unavailable. In fact, litigation in the California courts illustrates the direct conflict between federal antitrust policy and state law.

Virtually all of the reported cases involving state indirect purchaser statutes arise under California's Cartwright Act,[8] which was amended shortly after the *Illinois Brick* decision to expressly authorize actions for treble damages by any person "injured in his business or property" by reason of a violation, "regardless of whether such injured person dealt directly or indirectly with the defendant."[9] Cal. Bus. & Prof. Code § 16750(a). Cal-

[7] The most recent Congressional proposals to authorize indirect purchaser standing have attempted to address the multiple liability issues by requiring joinder of all interested parties, prohibiting duplicative liability, and permitting defendants to assert a pass-on defense. *See, e.g.*, H.R. Rep. No. 1397, 95th Cong., 2d Sess. (1978); S. Rep. No. 934, 95th Cong., 2d Sess. (1978); H.R. 2244, 98th Cong., 1st Sess. (1983); S. 915, 98th Cong., 1st Sess. (1983); S. 2481, 99th Cong., 2d Sess. (1986), Cong. Rec. S6352-53 (daily ed. May 21, 1986).

[8] There are two reported cases under the laws of other states. The Minnesota courts have held that Minnesota's indirect purchaser statute is not retroactive and that class actions under that statute are inappropriate when there are individual damage questions and the action would not be manageable. *Keating* v. *Philip Morris, Inc.*, 417 N.W.2d 132, 136-37 (Minn. Ct. App. 1987). The Illinois indirect purchaser statute has been held to authorize class actions only by the state attorney general. *Bobrowicz* v. *City of Chicago*, 522 N.E.2d 663, 669 (Ill. Ct. App. 1988).

[9] In addition to the decisions discussed below, the California Court of Appeals has held that the California indirect purchaser statute is not preempted by the *Illinois Brick* decision. *Crown Oil Corp.* v. *Superior Court*, 177 Cal. App. 3d 604, 223 Cal. Rptr. 164 (Ct. App.), *appeal dismissed sub nom. Crown Oil Corp.* v. *Lapidus Popcorn, Inc.*, 479 U.S. 879 (1986). The California Court of Appeals based its decision partially on the ground that *Illinois Brick*

ifornia case law demonstrates the wisdom of the *Illinois Brick* decision because the problems the majority opinion identified have occurred in California.

A. California Law Does Not Prevent Duplicative Recovery.

Appellants incorrectly claim that, "while the issue has not been squarely presented to the California appellate courts, *dicta* indicates that 'when the threat of double recovery occurs, [California trial courts] will fashion relief' to avoid such a result." Appellants' Brief at 16. In fact, the California courts have refused to take the only actions that might avoid duplicative recovery.

Unlike proposed federal legislation to overrule *Illinois Brick*,[10] the California indirect purchaser statute does not require the joinder of direct and indirect purchasers in a single action to avoid multiple liability. Although California law provides for joinder of parties to avoid a "substantial risk of incurring double, multiple, or otherwise inconsistent obligations", Cal. Code of Civ. Proc. § 389(a)(2)(ii), the California courts have refused to require joinder in indirect purchaser actions.

In *Union Carbide Corp.* v. *Superior Court*, 36 Cal. 3d 15, 679 P.2d 14, 201 Cal. Rptr. 580 (1984), the California Supreme Court held that defendants in an indirect purchaser action were not entitled to join as parties all direct and indirect purchasers in the distribution chain, despite the fact that a direct purchaser class action based on the

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was wrongly decided and frustrates the purpose of private antitrust law remedies and that the California statute incorporates the dissenting opinions in *Illinois Brick*. The Ninth Circuit has held that state court actions filed under the California indirect purchaser statute cannot be removed to federal court on the ground that the action really arises under federal law. *California* v. *California & Hawaiian Sugar Co.*, 588 F.2d 1270 (9th Cir. 1978), *cert. denied*, 441 U.S. 932 (1979).

[10] *See* note 7 *supra*.

same conduct was pending in federal court in Illinois. The court concluded that the California indirect purchaser statute was a "mandate to avoid unnecessary procedural barriers to indirect purchasers' prosecution of California antitrust suits." 201 Cal. Rptr. at 584. It also held that defendants had demonstrated only a possibility, not a substantial probability of multiple recovery, despite the pendency of the direct purchaser action in federal court. It concluded that because issues of pass-on of overcharges were essential to the California state action, but irrelevant in the federal action, there was no "substantial risk" of multiple liability. *Id.* at 585. The court did indicate, however, that the question could be reconsidered at a later point in the case if defendants were able to prove a substantial risk of multiple liability, *id.* at 584, 586, although it is unclear how defendants could meet this burden.

Another recent California decision leaves open the issue whether defendants in a state indirect purchaser action can assert a pass-on defense.[11] *B.W.I. Custom Kitchen* v. *Owens-Illinois, Inc.*, 191 Cal. App. 3d 1341, 1354, 235 Cal. Rptr. 228, 236 (1987). The court indicated that even if a plaintiff passed on the entire overcharge, it may have sustained other injury entitling it to recovery, such as lost sales. *Id.* Obviously, allowing multiple layers of indirect purchasers to recover damages, while denying defendants the opportunity to prove that the indirect purchaser plaintiff actually sustained no damage because the overcharge was passed on to subsequent purchasers, each of whom also has standing to recover damages, significantly increases the likelihood that there will be duplicative recovery.

The court also ruled that an action on behalf of all indirect purchasers could be maintained as a class action

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[11] The California indirect purchaser statute does not address the availability of a pass-on defense.

on the ground that the proof necessary to prove a price fixing conspiracy was susceptible to class-wide proof. 235 Cal. Rptr. at 233. Citing only cases involving direct purchasers, the court held that once the conspiracy was established, the essential element of "fact of injury" could be inferred if plaintiffs proved they purchased price-fixed goods that were largely unchanged in form despite the fact that they did not purchase directly from a conspirator. *Id.* at 234. The court inferred that at least some portion of the alleged overcharge was passed on to the indirect purchasers, despite the absence of any evidence on that issue. The court recognized that this issue would be more complicated if the product changed form between the direct purchaser and indirect purchasers.[12] Issues concerning the amount of damages sustained by individual class members were also held not to preclude class certification.[13] *Id.* at 236-37. The court concluded by stating that, "[t]he need for courts to adopt innovative methods for handling class-wide issues is amplified by the growing number of plaintiffs denied access to federal remedies who will sue under the Cartwright

[12] The attorney who has filed most of the California indirect purchaser actions has conceded that proof of damages in an indirect purchaser action is manageable only if the product does not change form between the direct and indirect purchasers. *See* McDavid, *The California Experience: A Hole in the Illinois Brick Wall*, Antitrust Vol. 1, No. 2, 16, 18 (1987). The California statute, however, does not limit indirect purchaser actions to situations in which the product has not changed form between the direct purchaser and indirect purchasers.

[13] The California courts, like the federal courts, have adopted a liberal standard for proof of the amount of damages in antitrust cases. Citing federal decisions, the California courts have held that a plaintiff need only make a reasonable estimate, which allows the jury to approximate damages. *Speegle* v. *Board of Fire Underwriters*, 29 Cal. 2d 34, 46, 172 P.2d 867, 874 (1946) (citing *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946)); *Suburban Mobile Homes, Inc.* v. *AMFAC Communities, Inc.*, 101 Cal. App. 3d 532, 546, 161 Cal. Rptr. 811, 818 (1980).

Act in our state courts. It can be presumed that a great number of these plaintiffs will be indirect purchasers." *Id.* at 237.

Thus, the procedural mechanisms that the *Illinois Brick* dissenters hoped would prevent duplicative recovery have not been available in California. The California courts refuse to utilize procedures, such as joinder, that might avoid duplicative liability if those procedures might also make it more difficult for an indirect purchaser action to proceed. It is also unclear whether California allows a pass-on defense. The consequence is that the availability of indirect purchaser actions under California law creates a substantial risk of duplicative recovery.

B. California's Antitrust Law Reaches Conduct Occurring In Interstate Commerce.

The conflict between federal and state law is particularly significant because the scope of the California Cartwright Act almost parallels the scope of the Sherman Act and is not limited to intrastate commerce.[14] The California Supreme Court has written that, "[n]either the Sherman Act nor the federal prohibition of undue burdens on interstate commerce . . . prevents [the Cartwright Act] from reaching transactions that have interstate aspects, but significantly affect state interests." *Younger*

[14] Unlike California, many state antitrust laws have been held to be limited to conduct occurring in intrastate commerce. *See, e.g., Kosuga* v. *Kelly*, 257 F.2d 48, 55 (7th Cir. 1958), *aff'd on other grounds*, 358 U.S. 516 (1959) (Illinois antitrust law applies "only to intrastate commerce"); *In re Wiring Device Antitrust Litigation*, 498 F. Supp. 79, 82, 84 (E.D.N.Y. 1980) (South Carolina antitrust law "does not apply to activities which are primarily interstate in nature"). State indirect purchaser statutes that permit or are construed to permit damage actions only for intrastate conduct would not directly conflict with federal antitrust policy. *Accord*, Brief of Amici Thirty-Five States at 15 n.8.

v. *Jensen*, 26 Cal. 3d 397, 405, 605 P.2d 813, 161 Cal. Rptr. 905, 910 (1980).[15] A California court has also held that a single direct sale to a California purchaser by each defendant is a sufficient "minimum contact" with the state to give the California courts jurisdiction over actions by indirect purchasers under the Cartwright Act. *St. Joe Paper Co.* v. *Superior Court*, 120 Cal. App. 3d 991, 175 Cal. Rptr. 94 (Ct. App. 1981), *cert. denied*, 455 U.S. 982 (1982).[16]

The practical effect of the Cartwright Act's interstate reach and the *St. Joe Paper Co.* decision is that an indirect purchaser action can be filed in California state court whenever substantial defendants are involved who may have made a sale to at least one California purchaser, even when the focus of the challenged conduct was national and even when an action by direct purchasers based on the same conduct is pending in federal court. Only cases that involve the exclusive intrastate jurisdiction of another state will be immune from a California indirect purchaser action. If indirect purchaser actions under the Cartwright Act are sanctioned in this case, it is likely that a California state court action on behalf of indirect purchasers will be filed in the wake of every federal court action on behalf of direct purchasers. This prospect almost assures duplicative recov-

[15] *Accord, e.g., R.E. Spriggs Co.* v. *Adolph Coors Co.*, 37 Cal. App. 3d 653, 112 Cal. Rptr. 585 (Ct. App. 1974); *cf. Partee* v. *San Diego Charger Football Co.*, 34 Cal. 3d 378, 668 P.2d 674, 194 Cal. Rptr. 367 (1983), *cert. denied*, 466 U.S. 904 (1984) (commerce clause precludes application of Cartwright Act to rules governing professional football; generally, however, *Younger* rule allowing interstate scope of the Cartwright Act still applies).

[16] Direct purchasers vigorously pursued a federal court action based on the same price fixing claims and ultimately secured settlements totalling more than $366 million. *In re Corrugated Container Antitrust Litigation*, 1983-2 Trade Cas. (CCH) ¶ 65,628 (S.D. Tex. 1983), *vacated on other grounds*, 1985-1 Trade Cas. (CCH) ¶ 66,457 (S.D. Tex. 1983).

ery, and, therefore, conflicts with the federal antitrust policy outlined in *Illinois Brick*.

Indeed, non-California residents are already attempting to avoid *Illinois Brick* by filing actions in California state courts. An indirect purchaser action is pending in the California state courts alleging a national conspiracy by the major oil companies to fix the retail price of gasoline. The attorneys general of Arizona, Oregon, and Washington have moved to intervene in that action to seek damages under California law on behalf of indirect purchasers who are residents of Arizona, Oregon, and Washington and who purchased gasoline only in those states, not in California. Motion for Leave to Intervene, *Retail Clerks Union Local 648* v. *Exxon Corp.*, No. 789-489 (Cal. Super. Ct. San Francisco May 8, 1986). Alternatively, these state attorneys general seek to certify a class including indirect purchasers in a "four-state region" consisting of Arizona, Oregon, Washington, and California. *Id.*

To date, it appears that no indirect purchaser action has been tried to judgment in the California state courts. Virtually all of the indirect purchaser actions have been settled simultaneously with federal direct purchaser litigation, apparently because no defendant has been willing to risk such litigation in the absence of procedural mechanisms to guard against duplicative liability.[17] This experience under the California Cartwright Act underscores the wisdom of the *Illinois Brick* decision. It also demonstrates the irreconcilable conflict between the federal statutory policy against multiple antitrust recoveries and state indirect purchaser statutes that inevitably will lead to duplicative recoveries.

[17] *See* McDavid, *The California Experience: A Hole in the Illinois Brick Wall*, Antitrust Vol. 1, No. 2 at 18-19 (1987).

CONCLUSION

For the reasons stated herein and in the brief of appellees, The Business Roundtable urges the Court to affirm the decision of the United States Court of Appeals for the Ninth Circuit and hold that state indirect purchaser statutes are preempted by federal antitrust law.

Respectfully submitted,

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AMICUS CURIAE

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STATE OF CALIFORNIA, *et al.*,
Appellants,

v.

ARC AMERICA CORPORATION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether the complexity, uncertainty, delay, and potential change in substantive outcomes imposed on the administration of the federal antitrust laws by the state indirect purchaser statutes at issue pose such "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," as articulated in *Illinois Brick* and confirmed by extensive legislative consideration, that these so-called "*Illinois Brick* repealers" must be preempted under accepted interpretations of the Supremacy Clause?

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

No. 87-1862

STATE OF CALIFORNIA, *et al.*,
Appellants,

v.

ARC AMERICA CORPORATION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING APPELLEES

INTEREST OF THE AMICUS *

The Chamber of Commerce of the United States of America (the "Chamber"), a nonprofit corporation organized and existing under the laws of the District of Columbia, is the largest federation of business, trade,

* Counsel for appellants and appellees have consented to the filing of this amicus brief. Pursuant to Supreme Court Rule 36.2, their consents are being filed with the Clerk of this Court simultaneously herewith.

and professional organizations in the United States. It represents the interests of over 180,000 corporations, partnerships, and proprietorships, as well as state and local chambers of commerce and trade associations.

The Chamber supports the balanced interpretation of Clayton Act § 4 advanced by this Court in *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968) ("*Hanover Shoe*"), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) ("*Illinois Brick*"). As confirmed by subsequent congressional review in which the Chamber actively participated, Clayton Act § 4 safeguards direct purchasers from the complexity and delay with which the "passing-on" defense could saddle their antitrust remedy, while concomitantly safeguarding antitrust defendants from multiple, overlapping indirect purchaser claims and the threat of duplicative recoveries. This regime has ensured equity and efficiency in Clayton Act § 4 antitrust overcharge litigation and has promoted reasonable and comprehensive settlement of disputes between identifiable parties. The Chamber believes that the Ninth Circuit's decision below properly safeguarded this balanced regime and should be affirmed. While it supports the concept of federalism, the Chamber cannot condone state efforts to reverse their defeats in Congress by invoking a network of state indirect purchaser remedies whose application to conduct in or affecting interstate and foreign commerce would, as a practical matter, force Clayton Act § 4 adjudication into the mold rejected by this Court in *Illinois Brick*.[1]

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[1] The Chamber does not oppose, on preemption grounds, the application of the state indirect purchaser statutes to conduct outside the jurisdictional purview of Clayton Act § 4. The Chamber believes, however, that these statutes are unfair and unwise and may raise serious issues under the Eighth and Fourteenth Amendments to the U.S. Constitution.

SUPPLEMENTAL STATEMENT OF THE CASE

As a supplement to the Statements of the Case by the parties, the Chamber provides the following four additional items of factual background not addressed in the briefs of the Appellant States or their supporting *amici*, but particularly relevant to the arguments set forth herein:

1. The District Court properly discerned, and forced appellants to concede, that recognition of indirect purchaser claims under state law in the case at bar would necessitate an extended pass-on trial in the District Court. Pass-on proceedings would have to address both so-called duplicated claims, where the direct and indirect purchasers claimed on the basis of the same sale, and so-called unduplicated claims, where determination of the amount of overcharge passed on to indirect purchasers still would be necessary to weigh their claims against those of direct purchasers. *See* Reporter's Transcript of Proceedings (Nov. 9, 1984), Joint Appendix ("J.A.") 70-79.

2. If appellants succeed in having this case remanded for conduct of the very pass-on inquiry foreclosed by this Court in *Illinois Brick* and *Hanover Shoe*, direct purchasers would continue to be denied even one cent of damage payment despite having long ago entered into a settlement agreement of these now 12-year-old proceedings.

3. The proponents of this pass-on adjudication below were active, and unsuccessful, participants in a massive effort to convince Congress to overturn the *Illinois Brick* decision. Within one month of that decision, the National Association of (State) Attorneys General circulated a draft bill which had as its "sole purpose . . . to overrule *Illinois Brick* directly and nothing else." Calkins, *Illinois Brick and its Legislative Aftermath*, 47 Antitrust L.J. 967 (1978) (citation omitted). By July 1977, Sen. Ken-

nedy and Rep. Rodino had introduced companion legislation proposing amendment of Clayton Act § 4 to authorize treble damages for any person injured, "*directly or indirectly*," by antitrust violations. S. 1874, 95th Cong., 1st Sess.; and H.R. 8359, 95th Cong., 1st Sess. (renumbered H.R. 11942 in 95th Cong., 2nd Sess.). By the following year, each bill had undergone subcommittee revision and hearings and was ultimately reported out of full committee by split votes.[2] However, strong opposition and tepid support precluded the adoption of the bills by either house of Congress. *See* 1978 C.Q. Almanac 194.

Over the course of each Congress since that time, the states' attorneys general and other opponents of *Illinois Brick* have found sponsors in both houses for no less than ten other proposals sharing the common goal of repealing, at least in large measure, this Court's construction of Clayton Act § 4.[3] Thus, Congress has heard and rejected the same arguments in favor of indirect purchaser remedies which Appellant States and their supporting *amici* present in this appeal. Indeed, while most of these "*Illinois Brick* repealer" bills were the subject of

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[2] *See* Effective Enforcement of the Antitrust Laws: Hearings on H.R. 8359 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 95th Cong. 1st Sess. (1977); and Fair and Effective Enforcement of the Antitrust Laws: Hearings on S. 1874 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 95th Cong., 1st & 2nd Sess. (1977 & 1978). *See also* 1978 C.Q. Almanac 194-95.

[3] *See* S. 300 (Kennedy, D-MA), 96th Cong., 1st Sess. (1979); H.R. 2060 (Rodino, D-NJ), 96th Cong., 1st Sess. (1979); H.R. 2204 (McClory, R-IL), 96th Cong., 1st Sess. (1979); S. 931 (Baucus, D-MT), 97th Cong., 1st Sess. (1981); S. 2772 (Gorton, R-WA), 97th Cong., 2nd Sess. (1982); S. 915 (Gorton, R-WA), 98th Cong., 1st & 2nd Sess. (1983 & 1984); H.R. 2244 (Rodino, D-NJ), 98th Cong., 1st Sess. (1983); Proposed Amendment to S. 1300 (Metzenbaum, D-OH), 99th Cong., 1st Sess. (1985); S. 2481 (Metzenbaum, D-OH), 99th Cong., 2nd Sess. (1986); S. 1962 (Metzenbaum, D-OH), 100th Cong., 1st Sess. (1987).

subcommittee or full committee hearings,[4] few (including the bill in the most recent Congress) were even reported out of committee, and none gained support sufficient to prompt the scheduling of floor debate.

4. The indirect purchaser provisions of Appellants California and Minnesota, as well as those of other states,[5] were enacted *after* this Court's *Illinois Brick* decision and *after* unsuccessful attempts to overturn that construction of Clayton Act § 4 in Congress.

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[4] *See, e.g.*, Antitrust Enforcement Act of 1979: Hearings on S. 300 Before the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. (1979); Restoring Effective Enforcement of the Antitrust Laws: Hearings on H.R. 2060 and H.R. 2204 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 96th Cong., 1st Sess. (1979); The Taxpayer Antitrust Enforcement Act of 1984: Hearings on S. 915 Before the Senate Comm. on the Judiciary, 98th Cong., 1st & 2nd Sess. (1983 & 1984); and The Antitrust Improvements Act of 1986: Hearings on S. 2481 Before the Senate Comm. on the Judiciary, 99th Cong., 2nd Sess. (1986).

[5] *See e.g.* Cal. Bus. & Prof. Code § 16750(a) (West 1987 & Supp. 1988); Hawaii Rev. Stat. § 480-13 (Supp. 1987); Ill. Ann. Stat. ch. 38, ¶ 60-7 (Smith-Hurd Supp. 1988); Kan. Stat. Ann. § 50-801(b) (Supp. 1987); Md. Com. Law Code Ann. § 11-209 (1983 & Supp. 1987); Mich. Comp. Laws Ann. § 445.778 (West Supp. 1987); Minn. Stat. § 325D.57 (1986); N.M. Stat. Ann. § 57-1-3(A) (Supp. 1987); R.I. Gen. Laws § 6-36-12(g) (1985); S.D. Codified Laws Ann. § 37-1-33 (1986); Wisc. Stat. Ann. § 133.18 (West Supp. 1987); *see also* Briefs of Appellant States at 19, n.6 and *Amici* States at 3.

The indirect purchaser provision of Appellant Alabama's antitrust statute (Alabama Code § 6-5-60) predates this Court's *Illinois Brick* decision. However, that statute has not been aggressively invoked in interstate commerce cases to which Clayton Act § 4 is applicable.

The antitrust statute of Appellant Arizona does not expressly provide an indirect purchaser remedy. *See* Ariz. Rev. Stat. Ann. § 44-1412 (1987); and Brief of Appellant States at 19, n.6.

SUMMARY OF ARGUMENT

In *Hanover Shoe* and *Illinois Brick*, this Court interpreted Clayton Act § 4 to bar both the defensive and offensive uses of passing-on proof, subject to narrow exceptions. As a result, federal law provides direct purchasers a straightforward and effective antitrust damages remedy free of pass-on complexity, while it protects defendants from the risk of multiple liability. By contrast, state laws applying to the same conduct purport to give an antitrust remedy to every purchaser in the distribution chain and require proof of passing-on by direct purchasers to ascertain each indirect purchaser's injury. As this case and even a simple hypothetical show, the federal antitrust statutes cannot be administered as contemplated by *Hanover Shoe* and *Illinois Brick* if the state indirect purchaser statutes are allowed to apply to the same conduct. Rather, federal courts will be required to subordinate the federal scheme to the state schemes by conducting or recognizing the results of pass-on trials and reducing the recovery of direct purchaser plaintiffs to avoid clearly unacceptable multiple liability.

Under accepted preemption principles, the Supremacy Clause ousts state laws which present "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." This Court's *Hanover Shoe* and *Illinois Brick* decisions are well-considered statements by this Court as to how best to accomplish and execute the full purposes and objectives of Congress as expressed in Clayton Act § 4. Congress' repeated rejection of legislation proposed to repeal *Illinois Brick* removes any possible doubt that the Court properly interpreted the will of Congress. Since the state statutes here stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress, they must be held preempted as applied to conduct subject to Clayton Act § 4.

ARGUMENT

I. THE STATES' INDIRECT PURCHASER STATUTES WILL EFFECTIVELY NULLIFY ESSENTIAL ELEMENTS OF CLAYTON ACT § 4 AS ARTICULATED BY THIS COURT IN *HANOVER SHOE* AND *ILLINOIS BRICK* AND AS RATIFIED BY CONGRESS

Preemption analysis in this case must begin by recognizing that the state indirect purchaser statutes at issue do not simply create an independent remedy with no necessary impact on the administration of the federal antitrust enforcement scheme. Rather, in cases to which Clayton Act § 4 also applies, the state statutes will inevitably and directly force changes and adjustments which will adversely affect Clayton Act administration and effectively change federal law.

A. If The State Indirect Purchaser Statutes Are Allowed To Stand, The Federal Courts Will Be Forced To Modify The Administration of Clayton Act § 4 To Accommodate Claims Contravening Federal Law

Both the federal treble damage action under Clayton Act § 4 and state indirect purchaser actions seek to redress economic injury caused by antitrust violations. Thus, both state and federal actions can and inevitably will be brought based on the same alleged overcharges by the same defendants. Moreover, in both state and federal actions, total injury typically will be measured by the amount of the overcharge found to be imposed by the violator(s). But the federal and state schemes sharply part company on the issue of allocating the overcharge among those claiming to be injured by it.

Federal law, as authoritatively construed by this Court in *Hanover Shoe* and *Illinois Brick*, bars indirect pur-

chaser claims concerning passed-on overcharges, subject to narrow exceptions. Thus, Clayton Act § 4 ordinarily provides recovery of the full amount of the overcharge to direct purchasers only. State indirect purchaser statutes, by contrast, allow every party in the chain of distribution to bring overlapping and/or competing claims for some or all of the common overcharge fund.

The question in this case is not which system is better or wiser. Rather, it is simply whether the federal scheme can survive in its present form if the state scheme is permitted to apply to the same conduct. If it cannot, the federal scheme must prevail.

In construing Clayton Act § 4 in *Hanover Shoe* and *Illinois Brick*, this Court stated two basic propositions: (1) pass-on trials and their attendant complications and uncertainties are incompatible with the proper, effective enforcement of the federal antitrust laws;[6] and (2) the imposition of overlapping liability, even for adjudicated antitrust violations, is not permitted. The Court then recognized that effective and fair enforcement of the federal antitrust laws requires that direct purchaser plaintiffs enjoy the right to a relatively clean and straightforward remedy free of the complication of pass-on proof. At the same time, antitrust defendants have the right to be free from the threat of multiple overlapping recovery by a wide range of unidentified and unidentifiable indirect purchaser plaintiffs.

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[6] The Court's rejection of both defensive and offensive passing on is consistent with the law's general reluctance to go beyond "the first step" and find a defendant liable for remote consequences. *See Hanover Shoe*, 392 U.S. at 488, n.6 (citation omitted). It is also consistent with the Court's repeated explanations that "it is appropriate for [Clayton Act] § 4 purposes 'to consider whether a claim rests at bottom on some abstract conception or speculative measure of harm.'" *Associated General Contractors v. Carpenters*, 459 U.S. 519, 543 (1983), *quoting Blue Shield of Virginia v. McCready*, 457 U.S. 465, 475, n.11 (1982), *citing Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262-63, n.14 (1972).

The Court's *Hanover Shoe* decision rested in part on its view that pass-on proof is unreliable. 392 U.S. at 492-93.[7] The Court also recognized that Congress' intention to provide an effective deterrent to monopolistic conduct would be seriously disserved by embroiling federal treble damages actions in protracted pass-on trials. Compounding the complexity of antitrust litigation, attempted proofs of passed-on overcharge would "require additional long and complicated proceedings involving massive evidence and complicated theories." *Id.* at 493.

Refuting the States and their supporting *amici*'s depiction of these concerns as solely a judicial creation, this Court highlighted in its *Associated General Contractors* decision the following prescient legislative history:

> This interest was also identified in the legislative debates preceding the enactment of the Sherman Act. Speaking in opposition to a proposed amendment that might have complicated the procedures in private action, Senator Edmunds said:
>
> "[. . .] if I were a lobbyist and wanted to entangle this business, I should provide that everybody might sue everybody else in one common suit and have a regular *pot-pourri* of the affair, [. . .] and leave it to the lawyers of the trust to have an interminable

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[7] The Court concluded:

> We are not impressed with the argument that sound laws of economics require recognizing this defense. A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact . . . . *in the real economic world rather than an economist's hypothetical model* . . . . Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable.

392 U.S. at 492-93 (footnote omitted).

(Unless otherwise noted, all emphasis indicated in materials quoted in this brief has been supplied.)

> litigation in respect of the proper parties, whether their interests were common or diverse or how they were affected, and take twenty years in order to get a result as to a single one of them. [. . .]" 21 Cong. Rec. 3148 (1890).
>
> See also *id.*, at 3149 (remarks of Senator Morgan opposing same amendment: "There is as much harm in trying to do too much as there is in not trying to do anything, and I think we have stopped at about the proper line in this bill, and I shall support it just as it is").

459 U.S. at 543-44, n.50.

This Court also clearly read Clayton Act § 4 to bar overlapping liability. In *Illinois Brick*, the Court described "the serious risk of multiple liability" which would result from allowing indirect purchaser recovery while abiding by the holding of *Hanover Shoe* as to full direct purchaser recovery:

> Even though an indirect purchaser had already recovered for all or part of an overcharge passed on to it, the direct purchaser would still recover automatically the full amount of the overcharge that the indirect purchaser had shown to be passed on; similarly, following an automatic recovery of the full overcharge by the direct purchaser, the indirect purchaser could sue to recover the same amount. . . . [O]verlapping recoveries are certain to result from the two lawsuits unless the indirect purchaser is unable to establish any pass-on whatsoever. As in *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 264 (1972), *we are unwilling to "open the door to duplicative recoveries" under § 4.*

431 U.S. at 730-31 (footnote omitted). Indeed, directly rejecting the position taken by the Solicitor General both in *Illinois Brick* and here, the Court castigated "proponents of this approach [who] ultimately fall back on the argument that it is better for the defendant to pay sixfold or more damages than for an injured party to go

uncompensated." *Id.* at 731, n.11. The Court flatly stated that it finds unacceptable even "a little slopover on the shoulders of the wrongdoers." *Id.* (citation omitted). *Accord Cargill, Inc. v. Montfort of Colorado, Inc.*, 479 U.S. 104, 111, n.6 (1986); *Associated General Contractors*, 459 U.S. at 550, n.7 (Marshall, J., dissenting) ("[T]he risk of duplicative recovery . . . is not simply a judicially invented reason for restricting the broad scope of § 4. Permitting two recoveries based on the very same injuries would be contrary to the basic statutory scheme . . .").

In contrast to the federal scheme, the state indirect purchaser statutes provide a remedy to any purchaser in the chain of distribution who can prove that some or all of the alleged overcharge was absorbed at its level. Pass-on proceedings to allocate an overcharge are thus *required* under these statutes. Moreover, while state statutes may permit "steps necessary to avoid duplicative recovery against a defendant" (Minn. Stat. § 325D.57 (1986)), the states provide no assurance against inconsistent pass-on determinations in multiple trials which could subject defendants to virtually unlimited liabilities. *See* Brief of *Amicus* Business Roundtable at 6-9. These characteristics of the state schemes, unless preempted, effectively will compel federal courts, contrary to the will of Congress, to modify the administration of Clayton Act § 4 in order to avoid virtually certain duplicative impositions foreclosed by this Court in *Illinois Brick*.

This case itself, while involving a fixed settlement contribution by defendants, illustrates how Clayton Act § 4 administration will be undercut by recognition of state indirect purchaser claims. While maintaining that a federal court's resolution of state indirect purchaser claims "does not necessarily require a complicated pass-on determination or in fact any such determination," the Appellant States acknowledge that the trial court here

must engage in "the economic analysis required to determine the scope of states' injuries" even if only "a handful of [their] claims . . . are identified as overlapping claims by direct purchasers." [8]

In a major concession, the States also acknowledge that complex pass-on determinations under state law must precede a damage award under federal law:

> [T]he trial court can either allocate the settlement on the basis of actual injury in cases of overlapping claims, or allocate the settlement by crediting the full overcharge to the direct purchaser claiming under federal law and the amount of actual injury to the downstream victim claiming under state law.

Brief of Appellant States at 37. Moreover, either of these allocation schemes would reduce—by the full amount of state law recoveries—the overcharge recovery direct purchasers would have received under *Hanover Shoe* and *Illinois Brick*.[9]

The distortions introduced into Clayton Act § 4 administration by state indirect purchaser claims in the in-

[8] Brief of Appellant States at 36-37. Indeed, after repeated protestations to the contrary, counsel for the State of California ultimately admitted to the district court below that the resolution of indirect purchaser claims in this case would require a pass-on trial. *See* J.A. 70-79.

[9] Illustrating the difficulty created by the state laws, the allocation schemes the States propose above are of the sort the Solicitor General found so clearly preempted that he assumed no one would even suggest them:

> Nor would the state statutes take away from the direct purchaser and give to the indirect purchaser a portion of the damages recovered under the federal statute that is attributable to pass-on overcharges. If any state statute is so construed, it would be preempted as so applied, as being in direct conflict with the direct purchaser's federal recovery as set forth in *Hanover Shoe*. [citations omitted]

Brief of *Amicus* United States at 20, n.13.

stant settlement are, in fact, less severe than those which will occur in future interstate commerce cases subject to both Clayton Act § 4 and the state indirect purchaser laws. Consider an oversimplified illustration in which manufacturer M is accused of an antitrust violation injuring direct purchaser DP, who sells the product unchanged to several indirect purchasers (IPs) at a lower level of the distribution chain. Assume that DP, as is its right, asserts a Clayton Act § 4 claim in federal court. The IPs, meanwhile, sue in state court under (for purposes of illustration) the Minnesota indirect purchaser statute expressly providing that courts "may take any steps necessary to avoid duplicative recovery." [10]

At this point, the *"pot-pourri"* of "interminable litigation" feared by Senator Edmunds in the 1890 Sherman Act debate begins in earnest.

First, there will be preliminary skirmishing seeking to bring all the claims before the same court. M may seek to bring DP into the Minnesota action and (before or after joining DP) to remove the state action to federal court for consolidation with DP's federal suit. Alternatively, M may bring a declaratory pendent or diversity action in federal court to achieve this consolidation and stay the independent state actions. However all this maneuvering turns out,[11] DP's Clayton Act § 4 claim will certainly be delayed and properly be permitted to go forward only if allocation of the overcharge between DP and the IPs can be established *prior to entry of a federal*

[10] Minn. Stat. § 325D.57 (1986). Of course, problems similar to those illustrated herein will arise under all state antitrust laws allowing indirect purchasers to establish and recover the amount of overcharges passed on to them.

[11] Because the federal court has exclusive jurisdiction over the Clayton Act § 4 claim, it is the only forum in which both state and federal claims may be jointly heard. *See Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 377-78 (1985). This fact makes it likely that the state and federal cases would together come before the federal court.

judgment. Indeed, given this Court's strong strictures against duplicative recovery under Clayton Act § 4, the district court could not permit DP to proceed to recover the full amount of the defendant's overcharge when pending state claims based on the same facts may adjudicate that the statutorily required injury to DP's "business or property" may be less than the overcharge or (in the case of 100 percent pass-on) may not have occurred at all. Thus, the federal court will either have to try the state and federal claims together or wait for the overcharge allocation issue to be resolved in the state court. In either case, the federal policy of swift and relatively simple deterrent action is thwarted.[12]

The impact of the state law overcharge allocation determination on Clayton Act § 4 administration is largely ignored by appellants but critical to the preemption issue. In our oversimplified hypothetical, assume that the court trying the state claims with DP as a party finds that DP absorbed $5 and passed on to the IPs $5 of a $10 overcharge. The federal court hearing DP's Clayton Act § 4 claim cannot then possibly award DP damages based on the full $10 overcharge given that the only established injury to DP's business or property is $5.[13] Thus, the Clayton Act § 4 regime established in *Hanover Shoe* will be nullified both procedurally and substantively.

[12] Indeed, the mere possibility of state indirect purchaser claims may be enough to delay federal DP suits. If defendants in federal suits have any basis to assert that their DP opponents passed on alleged overcharges to potential IP claimants, they will seek to protect themselves against duplicative liability. One possibility would be to seek to stay the DP proceeding until all potentially applicable state statutes of limitation had run. Justice Brennan's dissenting opinion in *Illinois Brick* discusses a number of other procedural devices, including consolidation, interpleader, and joinder, intended to protect against duplicative recovery—and sure to complicate the proceedings. 431 U.S. at 761-63.

[13] We demonstrate in Section I(B), *infra*, that the Solicitor General's contrary contention, which Appellant States now appear to support, is totally untenable.

Other reasonable scenarios for dual administration are more complicated and lead to even more troublesome results. Depending on the nature of the product involved, its distribution chain, and whether or not the product is transformed or incorporated into other products, pass-on proof may become more and more complex. If state claims are brought in more than one state and cannot be removed and consolidated, there may be conflicting findings as to the amount of the pass-on and even the amount of the overcharge. Indeed, if all purchasers are not made parties to state proceedings (which has occurred in California), multiple actions within a single state may present federal courts with conflicting allocation determinations. Even DPs faced with state determinations of limited injury will no doubt seek to maximize their federal recovery by asserting that they are still entitled to the full overcharge as to those purchases resold to IPs who either had no claim under their own state laws or simply did not sue.[14] Unless federal courts are otherwise prepared to oust public confidence by awarding damages premised on differing findings of DP injury in equivalent sales transactions, the principles of *Hanover Shoe* and *Illinois Brick* may well have to be set aside in these circumstances.

In sum, as their framers must have foreseen, the state indirect purchaser statutes would totally undermine the administration of Clayton Act § 4 as interpreted in *Hanover Shoe* and *Illinois Brick.*

[14] Non-global settlements in separate state cases would add a further allocation complication, though defendants are unlikely to settle so long as any potential plaintiff can seek the full amount of the alleged overcharge.

B. The State Indirect Purchaser Statutes' Undermining Of The Administration Of Clayton Act § 4 Cannot Be Avoided By The Glib Non-Solutions Offered By The Appellant States And *Amicus* United States

Appellant States and the Solicitor General argue that the problems and complexities we have outlined need not occur. In essence, they assert that the federal courts may simply ignore the state law indirect purchaser actions, thereby avoiding embroilment in what the Solicitor General finds to be unwise state schemes. But this position is clearly wrong.

First, this argument ignores completely the fact that *this case* comes from a federal court which *cannot* sidestep the problem of applying the state laws if they are upheld.

Second, for the federal courts routinely to refuse to hear state indirect purchaser cases would be contrary to basic principles governing pendent jurisdiction. This Court has held that, as a matter of constitutional power, pendent jurisdiction exists whenever the state and federal claims "derive from a common nucleus of operative fact" and "would ordinarily be expected to [be tried] . . . in one judicial proceeding." *UMW v. Gibbs*, 383 U.S. 715, 725 (1966). The Court instructed federal courts to look to "considerations of judicial economy, convenience and fairness to litigants" in exercising their discretion. *Id.* at 726. Here, the federal courts' jurisdiction over the Clayton Act claims of direct purchasers is exclusive (*see* n.11, *supra*), and the claims of the direct and indirect purchasers in any given case arise, by definition, out of the same operative facts. Thus, the interests of judicial economy, convenience, and fairness which the principle of pendent jurisdiction advances are served only by consolidation of the state law claims with the ongoing federal proceeding. As *Amici* State and Local Govt. Ass'ns. admit (at 14, n.8), "Where [as in this case] there is exclusive federal jurisdiction of federal claims and judicial economy calls for consolidated litigation of related state law claims, States and other state law plaintiffs have little choice as to forum."

Third, the States and the Solicitor General totally ignore the possibility that state indirect purchaser claims can be brought—or removed—as diversity cases in the same court where the direct purchaser's federal claim is pending. 28 U.S.C. § 1332 (1986); *see, e.g., St. John v. State Farm Mut. Auto. Ins. Co.*, 225 F.Supp. 74, 75-76 (W.D. Mo. 1964) (removal of state antitrust action on diversity ground withstands claim that state intended its antitrust laws to be subject to exclusive state court jurisdiction because "a state cannot limit federal jurisdiction"). Thus, where diversity exists, the federal courts will have *no* discretion to stay out of the state indirect purchaser law quagmire.

Finally, the argument that the federal courts can simply ignore state indirect purchaser remedies rests at bottom on the proposition that duplicative recovery is permissible, if not desirable, because the defendants are alleged antitrust violators.[15] Thus, the Solicitor General states (at 20):

> The only question here is . . . whether the indirect purchasers' state-law rights will be recognized in addition to the direct purchasers' federal law rights. As between *those* alternatives, it cannot be maintained that the latter, which simply creates additional liability for the same conduct and thus adds additional disincentives to those that already exist under federal law, meaningfully undermines the goal of deterrence. [emphasis in original]

Of course, the contention that defendants could compensate direct and indirect purchasers in full for the same alleged overcharges was already advanced by the Solicitor

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[15] *See* Briefs of Appellant States at 23-24; *Amici* State and Local Govt. Ass'ns at 14; and *Amicus* United States at 20, 22.

General and squarely rejected by this Court in *Illinois Brick*. *See* pp. 10-11, *supra*.

The prohibition against administering Clayton Act § 4 in any manner which would subject defendants to duplicative recoveries is statutorily binding whether potential duplication arises under state or federal law. *See Associated General Contractors*, 459 U.S. at 550, n.7 (Marshall, J., dissenting). Clayton Act § 4 provides for the award of three times the "damages sustained" by persons "injured in [their] business or property" by antitrust violations.[16] Thus, damages must be based exclusively on the amount of cognizable injury a given plaintiff has incurred.[17] If a federal court were to award a direct purchaser damage recovery based on the full amount of the subject overcharge in the face of litigated findings that the direct purchaser had limited its injury by passing on the overcharge, the court's award would lack statutory foundation.

By reading the injury requirement out of Clayton Act § 4, the States and Solicitor General would transform the coexisting federal and state antitrust remedies into a

[16] Similarly, Alabama Code § 6-5-60 provides, "Any person . . . injured . . . may . . . recover the sum of $500.00 and all actual damages . . ."; Ariz. Rev. Stat. § 44-1408A provides, "The state . . . may bring an action for . . . damages sustained . . ."; Cal. Bus. & Prof. Code § 16750(a) provides, "Any person . . . injured . . . may sue . . . to recover three times the damages sustained . . ."; and Minn. Stat. § 325D.57 provides, "Any person . . . injured . . . shall recover three times the actual damages sustained . . ."

[17] The injury-based nature of these statutes is not altered by the fact that the Clayton Act and certain state statutes treble (or double) the amount of injury in assessing liability upon defendants. The punitive component of these *private* remedies arises solely as a multiple of—and is thus strictly limited by—the amount of damages. The States and their *amici* ignore this fundamental characteristic which distinguishes these damage actions from multiple criminal fines and other purely penalty-based sanctions which separate sovereigns may impose.

private bounty-hunting scheme raising serious constitutional questions. As the Court reasoned in reconciling competing states' escheat claims, the imposition of liability for the same debt twice would constitute the taking of property without due process of law. *Western Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 75-77 (1961). The Court explained that a "holder of . . . property is deprived of due process of law if he is compelled to relinquish it without assurance that he will not be held liable again . . . in a suit brought by a claimant who is not bound by the first judgment." *Id.* at 75 (citations omitted); *see also In re Wiring Device Antitrust Litigation*, 498 F. Supp. 79, 87-88 (E.D.N.Y. 1980) (risk of multiple liability in recognizing indirect purchaser claims would raise serious due process question); *Russo & Dubin v. Alliance Maintenance Corp.*, 407 N.Y.S.2d 617, 620 (Sup. Ct. N.Y. Co. 1978) (recognizing state indirect purchaser claims "would create serious conflict between enforcement of state and federal antitrust laws which would subject defendants to multiple liability in derogation of due process").

Moreover, a privately-triggered punitive scheme devoid of the rational injury-based foundation upon which these statutes rest creates serious Eighth Amendment concerns of the sort this Court has just recently deemed worthy of its consideration. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, U.S. No. 88-556, *cert. granted*, 57 U.S.L.W. 2661 (Dec. 6, 1988). This Court has previously observed that "some punishments, though not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment." *Ingraham v. Wright*, 430 U.S. 651, 669 n.37 (1977); *see also Trop. v. Dulles*, 356 U.S. 86 (1958) (Eighth Amendment held applicable to noncriminal action found to be penal in nature). Here, the Solicitor General's reconciliation of the state and federal schemes would authorize private liti-

gants to impose arbitrary and punitive liability six or more times greater than the actual overcharge [18] upon a defendant unprotected by the procedural safeguards and political accountability that constrain a sovereign's criminal proceedings.

Even if the risk of duplicative recovery is not held to rise to constitutional significance, the overdeterrence it produces seriously upsets the balance Congress has struck under the federal antitrust system. As deterrence theory teaches, more deterrence is not necessarily better. Optimal deterrence is generally considered to be reached when the potential penalty for illegal activity equals the harm caused adjusted for the probability of detection. Beyond that point, uncertainty regarding possible exposure to excessive penalties can result in overdeterrence of lawful, procompetitive activity, as well as wasteful overspending to avoid unlawful activity.[19] The duplicative liability scheme created by the indirect purchaser statutes produces just such overdeterrence. Instead of the treble damages level of civil deterrence Congress has generally mandated, businesses are at risk for sextuple or greater damages.[20]

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[18] The administration of state indirect purchaser claims may result in the imposition of liability of even significantly more than six times the defendant's total overcharge. *See* Brief of *Amicus* Business Roundtable at 6-9.

[19] *See* Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169 (1968).

[20] In the Export Trading Companies Act and National Cooperative Research Act, Congress recognized that even treble damages can overdeter potentially valuable business activity and, thus, has expressly limited antitrust liability thereunder to single damages. 15 USC §§ 4001 *et seq.*, 4016 (Supp. 1988); 15 USC §§ 4301 *et seq.*, 4303 (Supp. 1988). Nevertheless, the indirect purchaser statutes here at issue may completely thwart the express objective of the latter act by allowing a single damages recovery by indirect purchasers under state law that wholly duplicates a full recovery by direct purchasers under federal law. *See* Pub. L. No. 98-462, 98 Stat. 3105, 3136-37 (1984) ("The guiding principle is that R&D conduct within the scope of a joint research and development venture is *never* subject to *more than actual damage recovery* . . ."). Thus, state indirect purchaser provisions are preempted, *a fortiori*, to the extent that they reach conduct to which the National Cooperative Research Act applies.

Nor can it be tenably argued that such overdeterrence is acceptable because the conduct deterred is unambiguously anticompetitive and unlawful. Neither the federal nor the state antitrust laws apply only to hard core *per se* price fixing conspiracies. Thus, duplicative recovery may be applied as well to alleged overcharges arising from generally procompetitive conduct such as joint ventures,[21] non-price vertical restraints,[22] and joint product marketing arrangements.[23] This Court correctly rejected such recovery in *Illinois Brick* and should do so again here.

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[21] *See, e.g., Broadcast Music v. CBS*, 441 U.S. 1 (1979).

[22] *See, e.g., Business Electronics Corp. v. Sharp Electronics Corp.*, 108 S.Ct. 1515 (1988).

[23] *See, e.g., Jefferson Parish Hospital No. 2 v. Hyde*, 466 U.S. 2 (1984).

II. THE STATE INDIRECT PURCHASER STATUTES' INEVITABLE IMPAIRMENT OF THE FEDERAL TREBLE DAMAGES SCHEME, AS THIS COURT HAS CONSTRUED IT AND CONGRESS HAS REFUSED TO DISTURB IT, DICTATES PREEMPTION OF SUCH STATE STATUTES UNDER ACCEPTED SUPREMACY CLAUSE PRINCIPLES

A. As Appellant States and Their Supporting *Amici* Acknowledge, Federal Law Preempts State Law Where "The State Law Stands As An Obstacle to the Accomplishment and Execution of the Full Purposes and Objectives of Congress"

Both courts below soundly held the Appellant States' indirect purchaser claims preempted under a principle the states and their supporting *amici* acknowledge to be valid. Specifically, the Ninth Circuit found the indirect purchaser claims preempted "because they stand 'as an obstacle to the accomplishment of the full purposes and objectives' of federal antitrust law." *In re Cement and Concrete Antitrust Litigation*, 817 F.2d 1435, 1447 (9th Cir. 1987), *pet. for reh. and sug. for reh. en banc denied*, No. 84-2865, slip op. (Feb. 9, 1988), *quoting Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).[24] Because this Court has consistently declared such "obstacle preemption" a proper basis to oust a state statute that frustrates federal law, the States and their supporting *amici*'s arguments about express preemption, preemption by occupation of the field,[25] or other forms of implied preemption are irrelevant.

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[24] The court below limited its finding of preemption to those indirect purchaser claims that do not fall within any recognized exception to the rule of *Illinois Brick* (none of which exceptions apply to the claims presently before this Court). *Id.*

[25] Thus, in contrast to its decision in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), the Court may properly find the state indirect purchaser provisions here at issue preempted without necessarily precluding states from enacting alternative protections for indirect purchaser interests, *e.g.*, civil or criminal penalty provisions.

In *Hines v. Davidowitz*, 312 U.S. 52, 67 (1940), the Court articulated the standard for obstacle preemption and, therein, the essence of all preemption analysis:

> There is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test . . . . In the final analysis, ... Our primary function is to determine whether, under the circumstances of [the] particular case, [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. [footnotes omitted]

The Court has continued to reaffirm the principle of obstacle preemption as set forth in *Hines*. *See, e.g., CTS Corp. v. Dynamics Corp. of America*, 107 S.Ct. 1637, 1644 (1987) (citing *Hines* obstacle preemption standard with approval); and *Michigan Canners & Freezers v. Agricultural Bd.*, 467 U.S. 461, 469, 477 (1984) (despite sharing the same basic goal as federal law, state agricultural bargaining law held preempted on *Hines* obstacle grounds).[26]

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[26] By definition, obstacle preemption analysis provides the "intent to preempt" which the States and their supporting *amici* claim to be absent in this case. Obstacle preemption is conceptually founded upon the principle that Congress intends to preempt any state law that would unduly interfere with laws which Congress has enacted. Because Congress cannot be expected to anticipate and expressly preempt every possible later-enacted state law which may thwart its purpose, this broad principle is essential to maintenance of the federal union. *See Gibbons v. Ogden*, 22 U.S. 1, 92-93 (1824).

Appellant States and their supporting *amici* recognize obstacle preemption,[27] yet they suggest that the traditional state authority to regulate competition effectively immunizes state antitrust laws from it. In *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982), this Court stated to the contrary:

> *In determining whether the Sherman Act pre-empts a state statute*, we apply principles similar to those which we employ in considering whether any statute is preempted by a federal statute pursuant to the Supremacy Clause. As in the typical pre-emption case, *the inquiry is whether there exists an irreconcilable conflict between the federal and state regulatory schemes.*

Indeed, the Court determined long ago that a state's exercise of power, no matter how fundamental the source, is subject at all times to the Supremacy Clause. Thus, in *Gibbons v. Ogden*, 22 U.S. 1, 92-93 (1824), where a state law was alleged to have "come into collision with an act of Congress, and deprived a citizen of a right to which that act entitles him," the Court explained:

> Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several states," or in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of [the state] must yield to the law of Congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous. . . . *The appropriate application of that part of the [Supremacy] clause* which confers . . . supremacy on laws and treaties, *is to such acts of the state legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged state powers, interfere with, or are contrary to the laws of Congress . . . . In every such case, the act of Congress . . . is supreme*; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it.

[27] *See* Briefs of Appellant States at 20; *Amicus* United States at 8; *Amici* States at 12; and *Amici* State and Local Govt. Ass'ns at 5.

In this case, state laws as applied create the type of "collision" held impermissible in *Gibbons v. Ogden*. As we have shown, in depriving both direct purchasers and defendants of the rights which federal law provides them, state indirect purchaser statutes stand as "an obstable to the accomplishment and execution of the full purposes and objectives of Congress."

B. By Extensively Considering But Consistently Rejecting Numerous Proposals to Overturn *Illinois Brick*, Congress Has Endorsed This Court's Determination of How Best to Accomplish the Legislative Objectives Underlying Clayton Act § 4

As their last line of defense, the Appellant States and their supporting *amici* claim that any obstacle the state indirect purchaser statutes pose to the administration of the federal antitrust enforcement scheme may be ignored because the federal scheme is insufficiently rooted in the purposes of Congress. But *Hanover Shoe* and *Illinois Brick* represent this Court's considered determination of how "the accomplishment and execution of the full purposes and objectives of Congress" may best be effected. Congressional approval of this determination is apparent from the repeated failure of legislative efforts to overturn *Illinois Brick* in every Congress since that decision was rendered.

Attempting to cast both *Hanover Shoe* and *Illinois Brick* as devoid of legislative foundation, the Appellant States and their supporting *amici* assert that both the trial and appellate courts below were mistaken in focusing their preemption analysis on what are called this Court's "prudential concerns", rather than the underlying legislative objectives. However, the States and their *amici* have misread the standard for obstacle pre-

emption. The *Hines* standard focuses not upon obstacles to the purposes and objectives of Congress *per se*, but rather upon "obstacles to *the accomplishment and execution* of the full purposes and objectives of Congress." 312 U.S. at 67. In *Hanover Shoe* and *Illinois Brick*, this Court held that pass-on defenses and indirect purchaser recoveries *were* "obstacles to the accomplishment and execution of the full purposes and objectives of Congress" in enacting Clayton Act § 4. As the Court expressly stated in *Illinois Brick* (at 746):

> [W]e conclude that *the legislative purpose* in creating a group of "'private attorneys general'" to enforce the antitrust laws *under § 4 . . . is better served by holding direct purchasers to be injured to the full extent of the overcharge* paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it. [citation omitted]

Thus, as demonstrated above and in the brief of Appellee ARC America, the Appellant States and their supporting *amici* simply overreach in seeking to portray these decisions as dictated only by "prudential concerns." Rather, the Court has carefully considered how pass-on trials would affect the administration of the federal antitrust laws and—based on unreliability of the evidence, unmanageability of the proceedings required to determine indirect purchaser injury, and a strong policy against duplicative recovery—has rejected both defensive and offensive passing-on proof. Thus, this Court's longstanding construction of Clayton Act § 4 provided the court below with a solid basis for its finding of obstacle preemption.

Any possible doubt that *Hanover Shoe* and *Illinois Brick* are correct determinations of how Congress intends the objectives of Clayton Act § 4 to be accomplished and executed has been dispelled by Congress' rejection of each of no less than twelve bills openly intended to repeal *Illinois Brick*. This record of recurring consideration and rejection of actual proposals to alter the Court's interpre-

tations here at issue presents a paradigmatic case in which congressional intent may reasonably be inferred from a legislative history of nonenactments. Yet, in claiming that recent Congresses have instead evinced clear support for indirect purchaser remedies, the States and their *amici* curiously omit any discussion of these numerous, decade-spanning occasions on which Congress rejected bills formally introduced before it on that very issue.[28]

As set forth in the Supplemental Statement of the Case, *supra*, the states-led drive to repeal *Illinois Brick* has persisted ever since the Court rendered that decision and expressly invited congressional revisitation of these issues. *See Illinois Brick*, 431 U.S. at 736, 746 (". . . Congress is free to change this Court's interpretation of its legislation"; ". . . until there are clear directions from Congress to the contrary, we conclude . . ."). From the 95th Congress to the 100th, at least twelve such bills or amendments have been formally in-

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[28] The States and their supporting amici instead focus upon isolated congressional comments already dismissed by this Court in *Illinois Brick* and the District of Columbia's 1980-81 enactment of a statute which Congress apparently never considered. First, the opposing parties seek to attach significance to elements of the legislative history of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 15c *et seq.*, which this Court soundly held inconsequential when such parties raised them previously in *Illinois Brick*. 431 U.S. at 733-34, n.14 (*parens patriae* provisions created only a new procedural device and not a new substantive right of recovery for indirect purchasers). Second, these parties rely solely upon dicta in a single lower court decision in claiming that Congress manifested its support for indirect purchaser remedies by not vetoing D.C.'s enactment of such a remedial provision as part of a comprehensive D.C. antitrust law. *See* D.C. Code Ann. § 28-4509 (1981). The D.C. statute was enacted by its city council, and there is no evidence that Congress gave it any conscious consideration. By contrast, Congress has consciously rejected every bill promoting indirect purchaser claims that it *has* addressed, and most of these rejections came *after* enactment of the D.C. indirect purchaser provision Congress is asserted to have embraced.

troduced before the appropriate committees of one or the other house of Congress, at least six distinct sets of hearings have been held by such committees, and on at least three occasions such bills emerged out of committee and were placed on the calendar of one or the other house. After all this extensive consideration and reconsideration, not one of these bills gained the support of either the Senate or the House of Representatives, let alone that of the full Congress and the President as necessary to reflect and codify the asserted congressional support for indirect purchaser claims.

Where Congress has declined to enact legislation that differed from judicial interpretation of a statute, the Court has found the judicial interpretation implicitly ratified by such congressional inaction. In particular, the Court has found Congress' long-time failure to alter a judicial construction of the antitrust laws "persuasive of legislative recognition that the judicial construction is the correct one." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488 (1940). The Court stated:

> This is the more so where, as here, the application of the [Sherman Act] . . . has brought forth sharply conflicting views both on the Court and in Congress, and where after the matter has been fully brought to the attention of the public and the Congress, the latter has not seen fit to change the statute.

Id. at 488-89. This principle applies, *a fortiori*, in a case such as the instant one, where Congress repeatedly considered but refused to disturb the judicial construction despite the Court's express invitation to do so.

Thus, the Court has found much significance in extended legislative epilogues to controversial judicial interpretations. In the noted case of *Flood v. Kuhn*, 407 U.S. 258 (1972), the Court observed that some 50 or more bills had been introduced in Congress to address the longstanding judicial exemption of professional baseball from the Sherman Act. Given that Congress had declined to enact any such bills despite extensive consid-

eration and several hearings on the subject, the Court held that federal antitrust law preempted state law claims where "Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively." *Id.* at 283-84.

The Court has found such demonstrations of "positive inaction" by Congress to present evidence much more compelling than "an ordinary claim of legislative acquiescence." *Bob Jones University v. United States*, 461 U.S. 574, 600 (1983). The legislative history in *Bob Jones* was noticeably similar to that in the instant case: some 13 bills had been introduced in the prior 12 years seeking to overturn the Internal Revenue Service interpretation there at issue, and not one such bill had emerged from any committee. *Id.* As in this case, given such "prolonged and acute awareness of so important an issue, Congress' failure to act on the bills proposed on this subject provides added support for concluding that Congress acquiesced" in the rulings at issue. *Id.*[29]

Thus, Congress' persistent refusal to enact any of the numerous proposals brought before it to overrule *Hanover Shoe* and *Illinois Brick* confirms that those decisions correctly state how Congress intends the federal antitrust laws to be administered. Accordingly, as both courts below concluded, the unavoidable obstacle which the state indirect purchaser statutes pose to the accomplishment and execution of the federal antitrust enforcement scheme dictates that such offending state statutes are properly ousted under the Supremacy Clause.

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[29] The Court has thus found significance in "repealer" bills that have been rejected not by the full Congress or even on the floor of one house, but instead were rejected or allowed to die even before reaching floor debate—as routinely was the fate of the bills proposing repeal of *Illinois Brick*. *Accord Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 732-33 (1975).

CONCLUSION

For the reasons stated herein and in the brief of Appellees ARC America Corporation, *et al.*, the Chamber respectfully requests the Court to affirm the decision of the Ninth Circuit Court of Appeals and to hold that the States' indirect purchaser statutes are preempted to the extent they apply to cases also subject to Clayton Act § 4.

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Appellants,

—v.—

ARC AMERICA CORPORATION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1862

STATE OF CALIFORNIA, *et al.*,

Appellants,

—v.—

ARC AMERICA CORPORATION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF APPELLEES

The National Association of Manufacturers, as *amicus curiae*, respectfully urges that the Court affirm the decision below, *In re Cement and Concrete Antitrust Litigation*, 817 F.2d 1435 (9th Cir. 1987), *prob. juris. noted*, 109 S. Ct. 51 (1988).[1]

INTEREST OF THE AMICUS CURIAE

The National Association of Manufacturers of the United States of America ("NAM") is a voluntary business association of approximately 13,500 companies and subsidiaries. NAM's

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1. Pursuant to Rule 36.2 of this Court, letters from counsel of record consenting to the filing of this brief are being filed with the Clerk herewith.

member companies employ 85% of all manufacturing workers in the United States and produce over 80% of the nation's manufactured goods. The NAM also is affiliated with 158,000 additional businesses through its Associations Council and the National Industrial Council.

The NAM and its membership have a vital interest in the legal question presented by this appeal. Members of the NAM manufacture and sell in interstate commerce products that in many instances are resold by their direct purchasers and others further down the chain of distribution. Accordingly, the state indirect purchaser laws at issue on this appeal expose NAM members to the risk of potentially ruinous multiple liability in separate suits by direct purchasers under the Clayton Act, in which federal law permits recovery for the entire overcharge even if that overcharge was passed on to indirect purchasers, and by indirect purchasers under the state laws at issue here. The NAM files this brief to demonstrate the existence of the Clayton Act's policy against such multiple liability and its preemptive effect on such state laws.

SUMMARY OF ARGUMENT

This Court decided in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), that only the direct purchaser may sue under § 4 of the Clayton Act and that he may recover the entire amount of an unlawful overcharge. The indirect purchaser may not sue at all. The Court's interpretations of the Clayton Act were based, in the respects relevant here, on federal antitrust policy that both favors maximizing the direct purchaser's incentive to sue by awarding him the full overcharge extracted from him (the policy behind *Hanover Shoe*) and also precludes exposing the defendant to multiple liability for a single overcharge in suits by successive purchasers (the policy behind *Illinois Brick*).

Several states disagreed so strongly with the *Illinois Brick* decision that they amended their respective state antitrust laws to give to the indirect purchasers under state law the antitrust damage claims this Court denied them under the Clayton Act. The NAM respectfully submits, and will demonstrate below, that the Ninth Circuit correctly held that these state statutes are preempted, because they impermissibly conflict with the congressional purposes and policies of the Clayton Act that this Court articulated as the basis for the *Hanover Shoe* rule permitting the direct purchaser to recover the full amount of the original overcharge and the *Illinois Brick* rule against imposing multiple liability for a single unlawful overcharge.

Appellants and their supporting *amici* argue that the federal rule against multiple liability cannot have preemptive effect because it expresses the intent only of this Court, and not of Congress. Specifically, appellants argue that these state laws accord, rather than conflict, with the asserted true intent of Congress, which was to maximize deterrence by permitting all injured plaintiffs, whether direct or indirect purchasers, to sue. The fallacy in this argument is its failure to assign any preemptive value to the decisions of this Court interpreting the federal antitrust laws. Appellants ignore the fundamental principles that this Court grounds all such statutory constructions, which *Illinois Brick* and *Hanover Shoe* most definitely are, in its interpretation of congressional intent and that such interpretations thereafter represent the ultimate authority on that intent. Here, the Court has based both *Illinois Brick* and *Hanover Shoe* on its finding of a congressional policy against imposing multiple liability for a single overcharge. In reaching those decisions and ascertaining the underlying congressional intent, the Court has rejected the same arguments presented by appellants here concerning Congress' intent in enacting Clayton Act § 4.

Appellants further argue that, even assuming this Court's rule against multiple liability reflects congressional policy, that policy is not violated where the duplicative liability is imposed by direct purchasers under federal law and by indirect purchasers under state law. That argument should be rejected as mere sophistry. A damage award is by definition duplicative

whenever it forces a defendant to pay damages more than once for the same overcharge and can have the same potentially ruinous effect on a defendant, even where part of the damages must be paid under federal law and part under state law.

The state indirect purchaser laws at issue here, therefore, conflict with the Clayton Act's policy against multiple liability. This Court should affirm the Ninth Circuit's decision holding them preempted on that ground.

ARGUMENT

I.

FEDERAL ANTITRUST POLICY PROHIBITS MULTIPLE LIABILITY IN SUITS BY DIRECT AND INDIRECT PURCHASERS

This case turns on the familiar principle that state laws are preempted to the extent that they conflict with federal law or policy. Such a conflict arises when state law " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). All that is required to find preemption is that state law "frustrates the objectives of the [federal] Act in some substantial way." *Edgar v. MITE Corp.*, 457 U.S. 624, 632 (1982) (White, Burger and Blackmun, J.J.). *See also Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964) ("federal policy 'may not be set at naught, or its benefits denied,' by the state law") (quoting *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942)).

The Ninth Circuit's preemption holding in this case rested upon, *inter alia*, an express federal policy against multiple liability. The Ninth Circuit stated that the "Supreme Court has held unequivocally that the policy against multiple liability exists and has not hesitated to make repeated reference to it." 817 F.2d at 1446 (citations omitted). Review of this Court's decisions ascertaining and applying the intention of Congress in

enacting the Clayton Act shows that the Ninth Circuit was correct.

This Court's seminal case on the respective rights of direct and indirect purchasers to recover antitrust damages is *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). That case established, with minor exceptions not material here, an irrebuttable presumption that the direct purchaser is injured in the full amount of any overcharge that he paid, and that his recovery under Clayton Act § 4 may not be diminished by proof that he passed any portion of the overcharge on to indirect purchasers. The Court identified as an important reason for that decision the avoidance of the fragmentation of the right of recovery among buyers at different levels of distribution, with a resulting weakening of the deterrent value of treble-damage actions. 392 U.S. at 494. Implicit in that rationale was the assumption that a defendant could be subjected only to a single liability—based upon the amount of the original overcharge that it extracted from the direct purchaser. If the Court had believed that Congress intended to expose (or was even indifferent to exposing) defendants to multiple liability in suits for the full overcharge by direct purchasers and suits for the passed-on portion of the overcharge by indirect purchasers, which obviously would have provided greater deterrence, the Court would not have expressed this reason for its *Hanover Shoe* decision.

When it next addressed direct/indirect purchaser recovery in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the Court first considered the alternative implicitly rejected in *Hanover Shoe*—permitting an indirect purchaser to recover the passed-on portion of the overcharge while retaining the *Hanover Shoe* rule permitting the direct purchaser to recover the full overcharge. The Court rejected that option because such inconsistent application of pass-on theories would expose a defendant to a risk of multiple liability that the Court expressly found to be "unwarranted," *id.* at 730, and "not • • • acceptable." *Id.* at 731 n.11. The Court expressly declined to " 'open the door to duplicative recoveries' under § 4." *Id.* at 731 (quoting *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972)) (footnote omit-

ted). Having concluded that pass-on rules should be applied consistently, the Court considered whether it should retain the *Hanover Shoe* rule permitting the direct purchaser to recover the entire overcharge that he paid. The Court concluded that *Hanover Shoe* had been correctly decided and should not be overruled. *Id.* at 736-47. The Court therefore held that an indirect purchaser may not recover the portion of the illegal overcharge allegedly passed on to him.

The *Illinois Brick* majority and dissenting opinions did not disagree on the existence of a federal antitrust policy against multiple liability, but only on the preclusive effect of that policy on indirect purchaser suits. The dissenting Justices, citing arguments offered by the United States as *amicus curiae* in *Illinois Brick*, *id.* at 762, found that procedural mechanisms such as consolidation and statutory interpleader would eliminate the danger of multiple liability in most cases, and believed on policy grounds that "the hypothetical possibility that a few defendants might be subjected to the danger of multiple liability does not • • • justify erecting a bar against all recoveries by indirect purchasers without regard to whether the particular case presents a significant danger of double recovery." *Id.* at 761 (Brennan, J., dissenting). The majority, however, disagreed. The Court found that there would always be some cases in which such procedural devices would not prevent multiple liability, and concluded that advocates of indirect purchaser suits "ultimately fall back on the argument that it is better for the defendant to pay sixfold or more damages than for an injured party to go uncompensated. • • • We do not find this risk acceptable." *Id.* at 731 n.11 (citations and quotation omitted).[2]

2. The state *amici* argue that *Illinois Brick* does not express a federal policy against multiple liability because it permits exceptions in which indirect purchasers may sue. Brief of Thirty-five States at 19. But there is no multiple liability in any case in which the exceptions might apply. The same facts that would establish an *Illinois Brick* exception also would establish an exception to *Hanover Shoe*, thereby enabling the defendant to avoid multiple liability by asserting a pass-on defense against the direct purchaser. *See Hanover Shoe*, 392 U.S. at 494; *Illinois Brick*, 431 U.S. at 736.

Other opinions of the Court also have relied upon the federal policy against multiple liability for a single overcharge. In *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), the Court rejected the argument that § 4 of the Clayton Act permits a state attorney general to sue as *parens patriae* for injury to the state's "general economy," stating that "[w]ere we • • • to hold that Congress authorized the State to recover damages for injury to its general economy, we would open the door to duplicative recoveries." 405 U.S. at 263-64. The Court later emphasized that "[a] central premise of our holding in *Hawaii* was a concern over duplicative recoveries." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 342 (1979). As the Court stated in *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 474-75 (1982), both *Hawaii* and *Illinois Brick* "focused on the risk of duplicative recovery engendered by allowing every person along a chain of distribution to claim damages arising from a single transaction that violated the antitrust laws." The Court also specifically noted in *Blue Shield* that *Illinois Brick* had found that risk to be "unacceptable." 457 U.S. at 474.

In *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), both the majority and dissenting opinions relied upon the federal policy prohibiting multiple liability. In holding that the plaintiff union lacked antitrust standing because its claimed injuries might duplicate those of other potential plaintiffs, the Court found support in " • • • the policy against duplicative recoveries." *Id.* at 545 n.52, 543-46. The dissenting opinion, while arguing that the recovery would not have been duplicative on the facts of that case, expressly acknowledged that "the risk of duplicative recovery" was "[c]ritical" to the decisions in *Hawaii* and *Illinois Brick*. *Id.* at 549-50 (Marshall, J., dissenting).

Finally, in addressing a claim for injunctive relief under the Clayton Act in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986), the Court again referred to the policy against multiple damage recoveries, stating that

> "[t]he treble damages remedy, if afforded to 'every person tangentially affected by an antitrust violation,' * * * or for 'all injuries that might conceivably be traced to an antitrust violation,' * * * would 'open the door to duplicative recoveries' * * * and to multiple lawsuits. In order to protect against multiple lawsuits and duplicative recoveries, courts should examine factors in addition to antitrust injury, such as the potential for duplicative recovery * * * to determine whether a party is a proper plaintiff under § 4."

Id. at 111 n.6 (quoting *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 476-77 (1982), and *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 263 n.14, 264 (1972)) (citations omitted).

The courts of appeals have uniformly recognized the policy against multiple liability stated in this Court's decisions and have applied that policy in a variety of factual contexts.[3] The

3. *E.g., Engine Specialties, Inc. v. Bombardier Ltd.*, 605 F.2d 1, 18 (1st Cir. 1979) (a "principal concern" of the Supreme Court "has been to avoid duplicative recoveries"), *aff'd on rehearing*, 615 F.2d 575 (1st Cir.), *cert. denied*, 446 U.S. 983 (1980); *Crimpers Promotions, Inc. v. Home Box Office, Inc.*, 724 F.2d 290, 294 (2d Cir. 1983) ("*Hawaii* and *Illinois Brick* sought to prevent" a " 'double recovery' "), *cert. denied*, 467 U.S. 1252 (1984); *Gregory Mktg. Corp. v. Wakefern Food Corp.*, 787 F.2d 92, 94 (3d Cir.) ("the Supreme Court has refused to permit antitrust actions that raise the risk of multiple treble damage recoveries"), *cert. denied*, 479 U.S. 821 (1986); *Southaven Land Co. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1083 (6th Cir. 1983) ("the Supreme Court majority in *McCready* concluded that deference to statutory policy had prompted acknowledgement of * * * confinement of the § 4 remedy" in "cases presenting a risk of duplicative recovery"); *In re Midwest Milk Monopolization Litig.*, 730 F.2d 528, 532 (8th Cir.) ("The Supreme Court recently reaffirmed its position that the risk of duplicative liability must be avoided"), *cert. denied*, 469 U.S. 924 (1984); *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864, 867-68 (10th Cir. 1981), *cert. denied*, 455 U.S. 1001 (1982); *Adams v. Pan Am. World Airways, Inc.*, 828 F.2d 24, 31 (D.C. Cir. 1987) ("allowance of the present suit would unequivocally expose defendants to the risk of multiple liability, an alternative the [Supreme] Court has emphatically rejected"), *cert. denied*, 108 S. Ct. 1225 (1988).

Third Circuit's opinion holding that a purchaser who bought from non-conspiring competitors of a violator may not sue under § 4 aptly stated why the policy against multiple recovery serves the antitrust laws' goal of maintaining a competitive economy:

> "Allowing recovery for injuries whose causal link to defendants' activities is as tenuous as it is here could subject antitrust violators to potentially ruinous liabilities, well in excess of their illegally-earned profits * * * [T]he judiciary should not be hasty to allow the treble damage action to become so destructive a force, when Congress intended only that it be used as a weapon to enforce the antitrust laws. * * * [T]he Supreme Court has been especially reticent in sanctioning multiple treble damage recoveries for the same injury [citing *Illinois Brick* and *Hawaii*], and * * * other courts have been wary of permitting 'overkill' recoveries, * * * whose punitive impact may unduly cripple a defendant and lead to an overall deleterious effect upon competition."

Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F.2d 573, 586-87 (3d Cir. 1979) (footnotes omitted).

II.

STATE INDIRECT PURCHASER STATUTES DIRECTLY CONFLICT WITH THIS FEDERAL ANTITRUST POLICY

Appellants and the United States acknowledge that for the purpose of preemption analysis the Court must assume that the state indirect purchaser statutes at issue here will impose multiple liability.[4] *See* Brief of Appellant States at 16 ("California

4. The Brief for the United States correctly notes that the Court need not consider whether the state statutes should be interpreted as a matter of state statutory construction to deny indirect purchasers any recovery that would duplicate a direct purchaser's recovery. Brief for the United States at 21 n.18. The Court should be aware, however,

law does not require that a direct purchaser pay over a portion of its Clayton Act recovery to downstream purchasers''), 34; Brief for the United States at 19 n.16. Their arguments that these laws nevertheless are not preempted by the federal policy against multiple liability are without merit.

Hanover Shoe makes the conflict manifest in any transaction involving interstate commerce where a single overcharge gives rise to both a federal and a state antitrust violation. The state laws' purported ''supplemental'' remedies for indirect purchasers do not, and could not, limit the rights of direct purchasers under federal law. Brief for United States at 17 n.13. Federal courts hearing such direct purchaser suits are bound by *Hanover Shoe* to award the direct purchaser the full amount of the overcharge that he paid. This recovery in federal court necessarily will be duplicative of any recovery by indirect purchasers under state law. The resulting multiple liability conflicts with this Court's decision in *Illinois Brick* that, as a matter of federal statutory interpretation, Congress did not intend such liability.

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that the California courts have declined to reach such an interpretation, holding that state law does not require an indirect purchaser plaintiff to join the intermediary direct purchaser as a defendant in order to prevent double recovery. *Union Carbide Corp. v. Superior Court*, 36 Cal. 3d 15, 22-24, 679 P.2d 14, 18-20, 201 Cal. Rptr. 580, 584-86 (1984). And while Minnesota's statute urges the court to ''take any steps necessary to avoid duplicative recovery against a defendant,'' Brief of Appellant States at 5, such precatory language cannot be deemed adequate to avoid multiple liability. The duplicative direct-purchaser action is likely to be filed in a federal court beyond Minnesota's control, and the procedural tools available to a trial court, such as joinder and interpleader, have already been found by this Court in *Illinois Brick* to provide inadequate protection against multiple liability. *Illinois Brick*, 431 U.S. at 731 n.11.

III.

THIS CONFLICT WITH THE FEDERAL POLICY AGAINST MULTIPLE LIABILITY REQUIRES PREEMPTION OF THE STATE LAW

A. The Court's Interpretations Of The Federal Antitrust Laws Are Grounded On Congressional Intent

Appellants and their supporting *amici* argue for a distinction between federal antitrust policies intended by Congress and federal antitrust policies intended by this Court, suggesting that Congress' policies will preempt conflicting state law, while the Court's policies will not. Thus, appellants criticize the Ninth Circuit for ''[u]sing as a proxy for congressional intent the decision of this court in *Illinois Brick* • • • ,'' Brief of Appellant States at 9, and argue that the policies expressed in *Hanover Shoe* and *Illinois Brick* '' • • • can have preemptive effect if, and only if, the text and legislative history of the federal antitrust laws demonstrate both that these were indeed the policies of Congress, and that Congress intended that federal law displace state law with respect to these policies.'' *Id.* at 21.[5]

This argument misconceives the role of this Court. This Court is not, and makes no claim to be, a super-legislature. Its decisions interpreting § 4 of the Clayton Act or any other federal statute pursue the single goal of ascertaining and carrying out the intent of Congress. *United States v. Cooper Corp.*, 312 U.S. 600, 606 (1941) (''Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress''). *See also Blue Shield of Virginia v. McCready*, 457 U.S. 465, 477

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5. *See also, e.g.*, Brief of Thirty-five States at 22 n.15 (''• • • in *Illinois Brick*, this Court was utilizing its own concerns to construe section 4 of the Clayton Act. It was not setting forth a statement of the purposes and objectives of Congress''); Brief of the National Conference of State Legislatures, *et al.*, at 14 (''The Court in *Hanover Shoe* and *Illinois Brick* did not suggest • • • that Congress has expressed any intent to limit potential multiple antitrust liability within the federal system'').

n.13 (1982) ("It bears affirming that in identifying the limits of an explicit statutory remedy, legislative intent is the controlling consideration").

To be sure, the congressional intent underlying some points of the antitrust laws may be discerned more easily than that underlying others. For example, in *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337-39 (1979), the Court found that the plain meaning of the words used in § 4 left no doubt that Congress intended to permit antitrust suits by consumers. By contrast, in *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978), the statute and legislative history provided no definitive statement on whether Congress intended that foreign sovereigns be considered "persons" who may sue under § 4. The Court therefore considered the question in light of the law's overall remedial purpose and concluded that " • • • Congress did not intend to make the treble-damages remedy available only to consumers in our own country." *Id.* at 313-14. *Cf. United States v. Cooper Corp.*, 312 U.S. 600 (1941); *Georgia v. Evans*, 316 U.S. 159 (1942). In each case the Court sought to ascertain congressional intent, as it also did in *Hanover Shoe* and *Illinois Brick*, which we demonstrate below.

B. The Court's Decisions Articulating A Federal Policy Precluding Multiple Liability Are Grounded On Congressional Intent

The Court's decisions articulating a federal policy against multiple liability rest upon the Court's conclusions concerning the intent of Congress in enacting § 4. In *Illinois Brick* the Court stated this, as follows:

> "until there are clear directions from Congress to the contrary, we conclude that *the legislative purpose* in creating a group of ' "private attorneys general" ' to enforce the antitrust laws under § 4 • • • is better served by holding direct purchasers to be injured by the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it."

431 U.S. at 746 (emphasis added) (quoting *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972)). Similarly, in *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), the Court stated that

> " • • • in the absence of some articulable consideration of statutory policy suggesting a contrary conclusion in a particular factual setting, we have applied § 4 in accordance with its plain language and its broad remedial and deterrent objectives. But *drawing on statutory policy*, our cases have acknowledged two types of limitation on the availability of the § 4 remedy to particular classes of persons and for redress of particular forms of injury."

Id. at 473 (emphasis added). The first such limitation, the Court then explained, was based on the policy against multiple liability identified in *Hawaii* and *Illinois Brick*. *Id.* at 473-75.

Justice Marshall's dissenting opinion in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), also stressed that the policy against multiple liability is a statutory policy based upon analysis of the intent of Congress in enacting § 4, and is not merely a rule of judicial administration. That opinion noted that " • • • the consideration of statutory policy underlying the Court's decisions in *Illinois Brick Co. v. Illinois* • • • and *Hawaii v. Standard Oil Co.* • • • was the risk of duplicative recovery that would have been created by affording the plaintiffs standing." *Id.* at 549-50 (citations and footnote omitted). Justice Marshall then explained that

> " • • • the risk of duplicative recovery that the Court relied on in both *Illinois Brick* and *Hawaii v. Standard Oil Co.* is not simply a judicially invented reason for restricting the broad scope of § 4. Permitting two recoveries based on the very same injuries would be contrary to the basic statutory scheme governing damages actions, for the result would be

> to subject antitrust defendants to sextuple-damages awards rather than the treble-damages awards that Congress contemplated."

Id. at 550 n.7.

C. Appellants' Arguments That Congress Intended Otherwise Are Without Merit

Appellants, citing an excerpt from the legislative history of the Sherman Act, assert that Congress intended to provide a remedy for indirect purchasers when it enacted § 4. Brief of Appellant States at 17, 19, 22. But this same legislative history was presented for the very same purpose and rejected in *Illinois Brick*.[6] The Court there rejected this interpretation of congressional intent, because it in effect found that the legislative intent not to permit multiple recovery outweighed any indications of an intent to permit suits by indirect purchasers. This Court, similarly, should reject appellants' reassertion of this argument as simply an attempt to reargue *Illinois Brick*.

Appellants also quote the legislative history of the *parens patriae* provisions of the Hart-Scott-Rodino Act to argue that Congress in 1976 manifested an intention to permit state law remedies on behalf of indirect purchasers. Brief of Appellant States at 27-29. The Court also foreclosed this argument in *Illinois Brick*, by holding, after review of the relevant legislative history, that the *parens patriae* statute did not change the reach of § 4 but merely established a new procedural vehicle by which state attorneys general could assert existing rights under § 4. *Illinois Brick*, 431 U.S. at 733-34 n.14 (quoting legislative history to the effect that " '[t]he establishment of an alternative remedy does not increase any defendant's liability' "). That holding precludes the argument, implicitly made by the states,

6. Indeed, this legislative history was presented in an *amicus curiae* brief joined by three of the appellants here. Brief for the States of Alabama, *et al.*, as Amici Curiae, *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (No. 76-404) at 11, 19, 21, 36.

that Hart-Scott-Rodino's adoption of a procedural device permits the states to enact laws that conflict with the federal statutory policy against multiple liability identified in this Court's decisions.

Similarly, there is no merit to appellants' argument that Congress' failure to repeal a District of Columbia Code provision purportedly permitting indirect purchasers to recover passed-on overcharges constitutes congressional approval of state laws permitting recovery by indirect purchasers. Brief of Appellant States at 29-31; Brief of Thirty-five States at 25-30. This statute was enacted by the Council of the District of Columbia, not Congress. It became law automatically without action by Congress when Congress did not expressly repeal it.[7] The courts have recognized that Congress' tacit acceptance of local legislation enacted by the District Council pursuant to powers delegated by Congress does not express congressional intent to repeal conflicting federal law. The cases instead hold that local District legislation stands on the same footing as state legislation and will be preempted if it conflicts with federal law or policy. *Doe v. Stephens*, 851 F.2d 1457, 1465 (D.C. Cir. 1988); *Don't Tear It Down, Inc. v. Pennsylvania Avenue Dev. Corp.*, 642 F.2d 527, 534 n.65 (D.C. Cir. 1980) (" • • • surely the preemption doctrine effects [*sic*] District of Columbia legislation no less than state enactments"); *Goudreau v. Standard Fed. Sav. & Loan Ass'n*, 511 A.2d 386, 389 n.4 (D.C. 1986). *Cf. Brown v. United States*, 742 F.2d 1498, 1502 (D.C. Cir. 1984) (*en banc*) (holding a notice of claim provision enacted by Congress in the exercise of its local legislative authority to be preempted because it conflicted with generally applicable federal law), *cert. denied*, 471 U.S. 1073 (1985); *Fireman's Ins. Co. of Washington, D.C. v. Washington*, 483 F.2d 1323, 1327-31

7. *See* District of Columbia Self-Government and Governmental Reorganization Act, D.C. Code Ann. § 1-101 *et seq.* (1981). The express purpose of this Act is to relieve Congress of the burden of enacting routine local legislation for the District. *Id.* at § 1-201.

(D.C. Cir. 1973) (finding preempted an insurance regulation adopted by the District Council without congressional participation).[8]

Finally, there is no merit to appellants' suggestion that Congress disagrees with *Illinois Brick* and would abandon the policy against multiple liability to permit indirect purchaser suits. Bills to repeal or modify *Illinois Brick* have failed repeatedly despite intense lobbying by these appellants.[9]

D. The Federal Policy Against Multiple Liability Has Preemptive Effect

Even the appellants here do not question the fundamental principle that state laws that conflict with congressional policy are preempted. (See authorities cited at page 4 above.) This principle requires preemption here because, as demonstrated above, (1) the federal policy against multiple liability is unquestionably a congressional policy that this Court has articulated and applied in interpreting a federal statute (pages 11-16 above), and (2) the state laws at issue here conflict with that policy (pages 9-10 above). Two opinions of this Court involving

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8. The appellants' and state *amici*'s reliance on *Barnes v. District of Columbia*, 611 F. Supp. 130, 134-35 (D.D.C. 1985), is misplaced. *See* Brief of Appellant States at 30-31; Brief of Thirty-five States at 29-30. The district court's statements in *Barnes* were clearly *dicta*, and insofar as such *dicta* conflict with the decisions of the D.C. Circuit cited in the text they are not good law.

9. The National Association of Attorneys General long ago passed and submitted to Congress a "Resolution on *Illinois Brick*" urging Congress to "reverse the *Illinois Brick* decision so that all purchasers, whether direct or indirect" may sue. 125 Cong. Rec. 1461 (1979) (referring to such resolution as "material of support" sent to Senator Kennedy). Since *Illinois Brick* was decided bills have been introduced in Congress repeatedly to amend the Clayton Act to permit suits by indirect purchasers or state attorneys general acting on their behalf. *See, e.g.*, S. 2022, 99th Cong., 2d Sess., 132 Cong. Rec. S335-39 (daily ed. Jan. 27, 1986); H.R. 2244, 98th Cong., 1st Sess., 129 Cong. Rec. H1560 (daily ed. March 22, 1983); H.R. 10783, 95th Cong., 2d Sess., 124 Cong. Rec. 2427 (1978). Despite vigorous lobbying by state attorneys general, none of those bills has passed.

issues analytically similar to those presented here confirm that these circumstances require preemption.

The first, and most directly analogous, is *Flood v. Kuhn*, 407 U.S. 258 (1972). The Court's principal decision in *Flood* was to adhere to its prior decisions holding professional baseball exempt from the antitrust laws. *Id.* at 284. But that holding did not dispose of Flood's attempt to fill the vacuum by applying state antitrust law to baseball. The Court held that the statements by the lower courts, including the trial court's statement that state antitrust regulation would conflict with federal policy, "adequately dispose[d] of" Flood's attempt to apply state antitrust laws to baseball. *Id.* at 285. By this language, the Court held that state antitrust laws could not be used where such use would conflict with federal policy. The federal policy was that announced by this Court in holding, based on the available interpretive materials, that Congress did not intend for baseball to be subject to the antitrust laws. The *Flood* holding is directly analogous here because (1) the preempting federal policy was found in this Court's pronouncements of congressional intent, rather than in the language or legislative history of the statute, and (2) the preempted state law was an attempt to fill a perceived gap left by federal law.

Felder v. Casey, 108 S. Ct. 2302 (1988), applied similar reasoning to a Wisconsin statute that effectively required a plaintiff to exhaust state administrative remedies before commencing an action under the federal civil rights statutes in the state courts. *Felder* held that statute to be preempted because it conflicted with the federal policy articulated in an earlier case (*Patsy v. Board of Regents*, 457 U.S. 496 (1982)) in which the Court had concluded with reference to civil rights actions in federal court that Congress had not intended to impose such an exhaustion remedy. *Felder*, 108 S. Ct. at 2311. *Cf. Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (Supremacy Clause bars state law inconsistent with " • • • the interpretation of the Fourteenth Amendment enunciated by this Court • • • ").

Appellants' assertions concerning the importance of state antitrust laws at pages 14-15 of their brief are, even if taken at

face value, simply irrelevant. A state law that conflicts with federal policy is preempted without regard to the relative importance that the state may attach to it. *Felder*, 108 S. Ct. at 2306; *Free v. Bland*, 369 U.S. 663, 666 (1962). *Cf. Flood v. Kuhn*, 443 F.2d 264, 268 (2d Cir. 1971) (" * * * we do not find that a state's interest in antitrust regulation, when compared with its interest in health and safety regulation, is of particular urgency"), *aff'd*, 407 U.S. 258 (1972).

The state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), invoked by the *amici* is similarly irrelevant.[10] *Parker* and its progeny rest on the Court's decision that Congress did not intend the federal antitrust laws to displace state laws imposing upon particular sectors of the economy a regime of state-supervised regulation rather than the competition otherwise intended by the antitrust laws. State antitrust statutes of the type at issue on this appeal have nothing to do with the *Parker* doctrine.

E. Appellants' Other Arguments That There Is No Preemptive Conflict Also Lack Merit

Appellants and *amici* argue that there is no conflict between federal antitrust policy and state laws permitting antitrust suits by indirect purchasers because federal and state antitrust laws have the same broad remedial goals. As demonstrated at pages 4-8 above, the Court has repeatedly found that the remedial goals of § 4 of the Clayton Act are limited by the statutory policy prohibiting multiple liability for a single overcharge. State statutes that conflict with this policy are preempted without regard to whether they seek to serve other objectives that federal law may share.

The Solicitor General cites six cases for the proposition that "state and federal sovereigns [can] simultaneously command obedience to prohibitions relating to the same act." Brief for the United States at 20-21. All of those cases, however, were

10. Brief of Thirty-five States at 9, 35; Brief of the National Conference of State Legislatures, *et al.*, at 6-7.

criminal cases.[11] This case does not involve the states' imposition of criminal penalties on antitrust violators. The states commenced this case in their properietary capacity as purchasers of allegedly price-fixed goods. *See* Brief of Appellant States at 6-7. None of the cited cases concerning the enforcement of state criminal statutes even comes close to establishing that a state law imposing multiple liability in civil actions can stand in the face of a clear federal policy precluding multiple liability.

Both appellants and the United States also point to cases purportedly holding that "the States are not limited to the remedies established by Congress but may provide additional or different remedies for the same conduct." Brief for United States at 21; Brief of Appellant States at 34-35. But in each of those cases the Court expressly found that the state remedy did not conflict with federal policy.[12] As demonstrated above, the state statutes

11. Only two of the cited cases actually considered the imposition of cumulative federal and state criminal penalties. *United States v. Lanza*, 260 U.S. 377 (1922); *Abbatte v. United States*, 359 U.S. 187 (1959). The remaining cases dealt with other issues. *Ex Parte Siebold*, 100 U.S. 371 (1879) (addressing constitutionality of federal criminal statutes); *United States v. Cruikshank*, 92 U.S. 542 (1875) (addressing sufficiency of indictment under federal civil rights law); *United States v. Wheeler*, 435 U.S. 313 (1978) (considering whether Double Jeopardy Clause barred the prosecution of an Indian in federal court following conviction in a tribal court); *Heath v. Alabama*, 474 U.S. 82 (1985) (considering whether Double Jeopardy Clause barred Alabama from trying defendant for murder during kidnapping after Georgia court convicted him of murder based on the same homicide).

12. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) ("We perceive no * * * conflict or frustration in the circumstances of this case"); *id.* at 257 ("the award of [state] punitive damages in the present case does not conflict with [the federal remedial] scheme"); *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143 (1963) ("the present record demonstrates no inevitable collision between the [federal and state] schemes of regulation"); *id.* at 146 ("no irrevocable conflict with the federal regulation requires a conclu-

at issue here directly conflict with the federal policy prohibiting multiple liability for a single overcharge. Contrary to appellants' rhetoric about dual sovereignty and the state police powers, the Court has not hesitated to hold preempted a state law granting a remedy that conflicted with a federal policy. *See, e.g., Flood v. Kuhn*, 407 U.S. 258 (1972); *Perry v. Thomas*, 107 S. Ct. 2520 (1987) (California statute authorizing wage collection actions without regard to any agreement to arbitrate was preempted by Federal Arbitration Act policy favoring arbitration); *McCarty v. McCarty*, 453 U.S. 210 (1981) (spouse's entitlement to military retirement pay under California community property statutes was preempted by the scheme and policy of the federal military retirement statutes); *Free v. Bland*, 369 U.S. 663 (1962) (state community property law right was preempted by Treasury Regulations creating a right of survivorship in United States Savings Bonds).

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sion that [the California statute] was displaced"); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 130 (1978) ("there is no conflict between the Maryland statute and the Robinson-Patman Act sufficient to require pre-emption"); *California v. Zook*, 336 U.S. 725, 735 (1949) ("The case would be different if there were conflict in the provisions of the federal and California statutes. But there is no conflict * * * "); *Colorado Anti-Discrimination Comm'n v. Continental Airlines, Inc.*, 372 U.S. 714, 722 (1963) ("To hold that a state statute identical in purpose with a federal statute is invalid under the Supremacy Clause, we must be able to conclude that the purpose of the federal statute would to some extent be frustrated by the state statute. We can reach no such conclusion here").

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be affirmed.

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Respectfully submitted,

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